No. 83 5108

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALEXANDER FEINBERG,

Petitioner,

-v-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the methods employed by Government agents in the course of their involvement with Petitioner were outrageous and overreaching, constituting a violation of Petitioner's Due Process rights?

2. Whether a defendant's predisposition can be proven by the introduction of non-criminal acts or by virtue of the defendant's response to the Government's suggesstion of crime, following months of enticement by the Government?

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Petitioner Alexander Feinberg prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the judgment of conviction of the United States District Court for the Eastern District of New York sentencing him to a term of imprisonment of three (3) years and a fine of forty thousand dollars. Following a jury trial, Petitioner was convicted of violation of 18 U.S.C. §371, §201, §203, §201(g), §203(a), and 1952.

OPINIONS BELOW

The opinion of the Court of Appeals dated April 5, 1983, affirming the conviction of Petitioner is annexed as Appendix A. The Order of the Court of Appeals, dated May 24, 1983, denying Petitioner Williams' Petitioner for a Rehearing En Banc is annexed as Appendix B.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF FACTS

A. Introduction

When the Abscam investigation began, Alexander Feinberg was a respected, seventy-two year old attorney with a small general practice in Cherry Hill, New Jersey. (T-3197-99, 3207-12, 3294-95, 3389-91)[1/]. Chief Prosecutor Thomas Puccio confirmed the fact that prior to the investigation, there was not one scintilla of evidence, or indeed even an allegation, that Mr. Feinberg had ever been engaged in illegal activity. (T-661, DP-413, 778). Following his service in the Navy during World War II, Mr. Feinberg established a private legal practice. In 1951, he became an Assistant United States Attorney for the State of New Jersey. He continued in that position until early 1953. (T-3547). In the late 1960's he was appointed by President Johnson to the Commission on Urban Problems. (T-3548).

Pursuing an interest in Democratic politics, he ran for Congress in 1958. (T-3549). In the course of this campaign, he met and befriended Senator Williams (T-3751, 4164-68). Although Mr. Feinberg was unsuccessful in his bid for Congress, his friendship with the Senator endured. (T-3751, 3785).

[1/] Citations to the record will be as follows: Testimony in the trial - "T"; Exhibits in the trial - "Ex."; Government Exhibits - "G.Ex."; Feinberg Exhibi "F.Ex."; Williams Exhibits - "W.Ex."; and testimony in the Williams/Feinberg Due Process hearings - "DP".

Before the F.B.I. entered Mr. Feinberg's life, he had an interest, together with a partner, in a small water company in New Jersey. Additionally, through his legal practice, he became aware that the Ritz Carlton Casino, as well as the Garden State Raceway were in need of financing. (T-3563-65, 3595-96, 3679, 3685-88). None of these ventures were illegitimate in any way. Yet, all became fruitful sources of innuendos in the prosecution's case against Mr. Feinberg.

B. Biocel

During a meeting with Senator Williams in the early 1970's Mr. Feinberg met Henry A. Williams, III, (hereinafter referred to as Sandy Williams). (T-3549-50). Their business relationship commenced with a garbage recycling project known as Biocel. (T-1549-50).

The original corporation, created to put to use the expertise of its founder, Ronald Penque, was Penque Williams, Inc. (T-1549-51, 2875-77). Despite the fact that Biocel never produced any revenues, Biocel of New Jersey, Biocel of Sussex and Biocel of Essex were formed to utilize local garbage recycling opportunities. (T-4181-86). Each of these projects proved to be a financial and political disaster. (T-3555, 3568-69, 3583, 3834-35, 3946).

Mr. Feinberg had no financial interest in Biocel. However, at the request of Sandy Williams, he incorporated Biocel of New Jersey and Biocel of Sussex, and issued shares of stock in the latter to the wives of Mr. Feinberg,

Sandy Williams and Senator Williams. (T-1551-52, 2893, 3550-53, 3753-54). Mr. Feinberg also represented Biocel before various regulatory bodies, in an effort to obtain necessary permits. (T-2894-96, 2909, 3553-54). All of these proceedings were public; all stock interests were disclosed. (T-3554). According to Penque, Biocel was defeated by local political pressure. (T-2902, 3041).

Mr. Feinberg after encountering severe problems with one permit application, sought a meeting with the appropriate state commissioner. (T-3557). Unable to reach then Commissioner Bardin, Mr. Feinberg asked Senator Williams to arrange a meeting. (T-3557). Mr. Feinberg subsequently met the Commissioner, but the permit was not reinstated. Commissioner Bardin emphatically denied that either the Senator or anyone else had exerted political pressure on the Commission. (T-3403-04, 3557, 3588). Both Penque and Mr. Feinberg denied using improper political influence in attempting to obtain permits. (T-2901-03, 2910-11).

Mr. Feinberg also prepared an application for Biocel to participate in certain dumping activities. (T-3558). Although Penque's recycling process had been given favorable technical approval by several reputable institutions, it was shunted aside in favor of a competitor. (T-3558). Convinced that Biocel's loss was the result of improper influence, Sandy Williams decided to "appeal" to the Governor. When his efforts to make an appointment with Governor Byrne failed, he contacted Senator Williams. Sandy Williams and Mr. Feinberg were

subsequently granted a meeting with Charles Corrella, a member of Governor Byrne's staff. (T-1555-56). Corrella indicated only that he would relay Sandy Williams' allegations of improper influences to the Governor. (T-3559). During the Corrella meeting, in which Mr. Feinberg said nothing, Sandy Williams never asked for any favorable consideration for Biocel and none was forthcoming (T-1947-53, 2016, 3559).

In the senatorial campaign of 1976, Senator Williams suffered considerable political embarrassment as a result of his involvement in Biocel. His opponents leveled accusations that he had used undue influence in the application for dumping permits in the Meadowlands. These allegations were denied by the Senator and unsubstantiated by his opponents. Nevertheless, the Senator and his supporters regretted his involvement in the project. (T-3555, 3568-69, 3583, 3834-35, 3946).

C. Piney River

Penque's recycling process required large amounts of phosphorous. (T-1564, 2914-22). If a cheap source could be found, the process would become extremely valuable. Sandy Williams located a source in Piney River, Virginia. (T-1564, 2914-22).

Penque and Sandy Williams obtained an option on mining property in Piney River. (T-1564-65, 1823-25; G.Ex. 45, G.Ex. 40). In 1975-76, Sandy Williams sought financing to purchase the property. He was introduced to the Stone Foundation ("Stone") by Ernest Garrett and after some discussion, Stone agreed

to finance the mine. (T-1568). Title to the property was taken by the newly-formed United States Titanium Corporation, ("USTC:) which was owned as follows: Penque Williams, Inc, 56 2/3%; Garrett, 33 1/3%; and Alan Torriello, 10%. (T-1568). At the closing for the purchase of Piney River, USTC received $600,000.00 from Stone. In turn, USTC gave Stone a mortgage of $1,200,000.00 on Piney River. Financing the debt became an immediate problem. After one mortgage payment, USTC went into default. (T-1573, 1577-78).

Sometime prior to the default, Sandy Williams, believing he had a malignancy, prepared a document which stated, in essence, that one-half of everything he owned belonged to Senator Williams. However, Sandy Williams never signed these documents (G.Ex. 48; T-1571, 1574-75). The documents were given to Senator Williams who considered it a nice gesture but attached no particular value or substance to it (T-4193-96).

In 1977, Sandy Williams discussed financing Piney River with his old friend, George Katz. They obtained options on the property adjacent to that owned by USTC. (T-1580, G.Ex. 44)[2/].

[2/] Mr. Feinberg was only vaguely aware of this transaction and, as with all his information concerning the mine's potential, he received his only information from Sandy Williams.

Concommitant with the option transaction was a planned reorganization of USTC which would allow for Garrett, Torriello, Katz and Sandy Williams to share in the reorganized corporation. According to Sandy Williams, the Senator was to share in Sandy's interests based on the above-described documents. (T-1580-81). The proposed reorganization never took place and the need for financing remained a constant and separate problem. (T-1581, 1924-25).

After the USTC default, Sandy Williams, who was seeking loans, prevailed upon the Senator to introduce him to certain financial institutions. Sandy Williams testified that the Senator had exerted no undue pressure on either of the two institutions to whom he was introduced. (T-1740-41). Furthermore, at no time during the course of these negotiations did Sandy Williams indicate that the Senator had an interest in the venture. (T-1742). All efforts to obtain financing with these and other institutions were unsuccessful. (T-1787-88, 1803-0

All reports obtained by Sandy Williams indicated that Piney River was a valuable property only awaiting sufficient funds to commence viable economic operations. (T-2003, 2007, 2042). In 1979, the need to obtain this financing to salvage the mining venture became desperate. (T-1896). Both Senator Williams and Mr. Feinberg believed, and continued to believe, that the project had merit.[3/]

D. The F.B.I. Piney River Scam

Early in January 1979, Senator Williams, attending a political function in Camden, New Jersey, (T-4227-28), had a short social conversation with Angelo Errichetti, Mayor of Camden. Mayor Errichetti mentioned that he had been in contact with certain financial advisors who appeared to have substantial amounts of investment capital. (T-4232-33).

3/ To date, the F.B.I. has never sent anyone to ascertain whether the mine was a legitimate and viable mining venture. The initial agent in charge had no information as to the extent of the ore deposits or their economic potential. He, nor anyone else, made any attempt to confirm that the integrated Piney River American Cyanamid purchase was a viable entity, explaining that this was not his job. (T-692-93, 699, 1141-43).

Senator Williams indicated he had some friends seeking funding and asked Errichetti if Mr. Feinberg could call him. (T-4233). Thereafter, Mr. Feinberg arranged a meeting with Errichetti. (T-1582, 4235). Thus, the F.B.I. entered Mr. Feinberg's life.

At the meeting were Special Agent John McCarthy, posing as Jack McCloud the Chairman of Abdul Enterprises,[4] F.B.I. informant Mel Weinberg, Errichetti, Mr. Feinberg and Sandy Williams. (T-1583, 3562-63). Sandy Williams dominated the meeting, describing Piney River and its financing need. Sandy Williams indicated that titanium extracted from the mine was to be used to manufacture paint. (T-617). In response to Weinberg's query, Sandy Williams indicated that the owners of the mine were Garrett, Katz, Torriello, Sandy Williams and Mr. Feinberg. At some point in the conversation, it was mentioned that the Senator was interested in the venture. (T-1242, 1583-84). At the conclusion of the meeting, Sandy Williams agreed to provide to Weinberg data concerning the mine. (T-1585; G.Ex. 46). In addition, the Arabs were to commission an engineer to evaluate it. Sandy Williams indicated that the project would require ten to thirteen million dollars. Weinberg immediately indicated that if the venture appeared viable, the Arabs would be willing to provide the full thirteen million. (T-1585; G.Ex. 46)[5].

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[4] The corporate front for the Arab investment capital was Abdul Enterprises. The background to its establishment and the manner in which the F.B.I. manipulated its operation is thoroughly familiar to this Court as a result of previous petitions for certiorari by defendants involved in the Abscam probe.

[5] The amount of energy invested by the F.B.I./Strike Force team in attempting to "make a case" against its defendants was astounding. Weinberg once remarked that, "Once you get a sucker on the line, you got to keep calling him day and night and never let him off." (T-1366). Weinberg and the F.B.I. met or spoke with the targets herein eleven (11) times, in March 1979. By May, the frequency had increased to twenty-seven (27) visits or calls by Weinberg. In June and July, Weinberg engaged in twenty (20) meetings and calls. There were, incredibly, forty-one (41) such incidents in August. September saw forty-seven (47) calls and meetings by Weinberg. In November and December there were thirty-seven (37). (F.Ex. X). Weinberg and the F.B.I. apparently subscribe to the old adage, that if at first you don't succeed, try, try again.

Soon after this meeting, Errichetti called Mr. Feinberg and indicated that the "Arabs" were interested in purchasing Garden State Raceway. At Errichetti's request (T-3563-66), Errichetti, Weinberg and Special Agent Anthony Amoroso, acting as Tony Devito, the new president of Abdul Enterprises, met to discuss the proposal. (T-3556-57). The conversation started with "John McCloud's" status as an old-time Boston politician who had a "certain way" of doing things, the implication being that bribes had to be used in any business transaction. (T-3567). Mr. Feinberg immediately declared that he did not do business that way. (T-3567). He further stated that the easiest way to purchase the race track was to proceed legitimately. (T-3572, 3576-77). Weinberg tried again to get Mr. Feinberg to inculpate himself, indicating that the Senator was an indispensible party for the financing. (T-3567). Mr. Feinberg stated that the Senator had nothing to do with the matter. (T-3572).

This was the first of innumerable conversations initiated by Weinberg urging concealment of Senator Williams' interest in Piney River. Day after day, month after month, Weinberg repeated this theme. After the Biocel disaster, Mr. Feinberg and the Senator were extremely reluctant to prematurely disclose the Senator's interest in Piney River. (T-3568-73, 3583). They had learned that however innocent and legitimate their efforts, such efforts could result in unwarranted accusations and public embarrassment, which could needlessly damage the Senator's career. (T-3568-69, 3583).

Originally, Mr. Feinberg was unsure of the law governing the Senator's duty to disclose (G.Ex. 7A, pp. 1-3). He eventually sought expert advise from tax counsel with regard to Piney River. Expert counsel confirmed Mr. Feinberg's preliminary opinion that at this point it was unnecessary to disclose the Senator's interest in Piney River, since it was nebulous and without economic value. (T-3606-07). Senator Williams and Mr. Feinberg persistently reiterated that if the project were ever incorporated, and funded, thereby providing the Senator with something of financial value, he would promptly disclose his holdings. Throughout Senator Williams and Mr. Feinberg believed that no prior disclosure was legally required. (T03627-29, 3779; F.Ex. C).

In March 1979, Sandy Williams informed McCarthy that the American Cyanamid plant in Savannah was for sale and that coupling this plant with Piney River could have great profit potential. (T-1587). It would require an additional one hundred million to finance both projects. (T-1587). The Arabs immediately agreed to look into the possibilities. Neither Senator Williams nor Mr. Feinberg were aware of this exchange at the time.

Shortly thereafter, Weinberg requested that Mr. Feinberg and Sandy Williams bring the Senator to a party in Florida to meet "Sheik" Yassir Habib, the purported key involved in the financing of the mine. (T-1243-44, 3577). The Senator and Mr. Feinberg paid their own airfare. (T-3585)[6/].

6/ Subsequently on April 13th upon learning that Senator Williams was going on vacation, Weinberg urged Mr. Feinberg to convince the Senator to use Abdul's corporate jet for the trip. After conferring with the Senator, Mr. Feinberg informed Weinberg that the Senate Rules precluded acceptance of the offer. (F.Ex. K).

At the party, in response to a specific question from Weinberg, Mr. Feinberg stated that, although the Senator had no financial interest in the mine, he would endorse the project privately. (G.Ex. 2A, pp. 18-20). This statement, of course, was based upon Mr. Feinberg's belief that the Senator owned nothing until the project was formalized and funded. (T-3569, 3584). Mr. Feinberg stressed at the party that the project must be handled in a legitimate manner. (G.Ex. 2A, p. 21).

At a meeting subsequent to the party, not attended by either the Senator or Mr. Feinberg, Sandy Williams discussed an additional seventy million needed to purchase the Cyanamid Savannah plant. Weinberg promptly and generously agreed to the seventy million increase, on the condition that he and DeVito share a ten percent interest in the venture and that it be a straight loan. (G.Ex.4A, p. 8).

Sandy Williams recalled that in May 1979, he had read various articles about the military value of titanium, (T-1583, 5196). In a discussion with Katz concerning Government contracts, Sandy Williams expressed his belief that influence could not be used because Government contracts were selected by bids, (T-1597).[1/] In late May 1979, Katz conveyed the information on titanium to Weinberg. (G.Ex 5A)

While Piney River had appeared viable to all involved before the idea of government contracts was ever raised, once Weinberg learned of this possibility, he employed it time and time again to attempt to coerce Mr. Feinberg and the Senator into inculpating themselves by agreeing to conceal the Senator's interest in Piney River. Now, according to Weinberg, there would be no project

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1/ At trial, Harold C. Petrowitz, an expert in government contracts, established there was little or no way a member of Congress could influence government contracts, whether purchased under the Stock Pile Act or other governmentprocurement regulation. (T-2778, 2849). Mr. Feinberg also testified that to his knowledg, government contracts could only be obtained by sealed bid. (T-3599).

without government contracts and no Arab money without the Senator agreeing to use his influence to procure the contracts. Further, according to Weinberg, the Senator could not use his influence to obtain the contracts if his interest were disclosed.

Weinberg began calling Mr. Feinberg, and asking whether he had seen the articles about titanium - Mr. Feinberg had not. (G.Ex. 6A, p. 1). Weinberg then raised, for the first time, the idea of procurring government contracts. (G.Ex. 6A, p. 1)[8/]. Mr. Feinberg was beginning to feel intense pressure from Weinberg to adopt the "Arab way". He attempted to pacify Weinberg by indicating that the Senator would "make introductions". Mr. Feinberg hoped that if Weinberg were placated, the financing would become available. In reality, he thought that the Senator would do what any Senator legitimately could do - make introductions. (T-3599-3600). In Mr. Feinberg's mind, no improper activity would be necessary since Piney River would sell itself on its merits.

During this same period Weinberg and Mr. Feinberg discussed creating various corporations to acquire Piney River and the options to adjacent properties. Weinberg arranged a luncheon at the Hotel Pierre purportedly to discuss the corporate structure. (T-3592). He used this occasion to pressure Mr. Feinberg and the Senator, hoping to get useful inculpatory admissions. Just before the luncheon, Mr. Feinberg was approached in the hotel men's room by Weinberg and Amoroso. They urged him to persuade the Senator to use his influence to get government contracts. (G.Ex. 7A-1). Mr. Feinberg stated that it should

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8/ This is only one of the many instances where Weinberg directed the scenario with uncanny skill not apparent until later. (T-3585, 3720, 3766). For example, Weinberg was obsessed with Senator Williams' being in on meetings and "protecting the Senator". (T-3766-77).

be understood that the Senator could not obtain contracts but could only "open up the doors" — he contemplated the Senator making a legitimate call or an introduction. (T-3602). Weinberg persisted in his attempts. Mr. Feinberg responded by stating that the Senator would not guarantee contracts, would not perjure himself regarding the disclosure of any meaningful interest that he might acquire in the mine, and would disclose such an interest when it became viable. (T-3601-04, 4279-80, F.Ex. M).

Weinberg, Amoroso and Feinberg joined the Senator and Sandy Williams in the dining room. Enroute, Weinberg and Amoroso tried again, pressing Mr. Feinberg about the Senator's ability to obtain government contracts, especially if the Senator were to have an interest in Piney River. Mr. Feinberg repeated that the Senator could "open doors" (G.Ex. 7A-2, pp. 1-3), but made clear that any decision regarding the disclosure of the Senator's interests in the venture had to wait until he reviewed the law on collateral investments for a United States Senator. (T-3604-06).

In the luncheon meeting, Senator Williams unequivocally stated that he would disclose any interest that he had in the proposed corporation, once the venture became viable. (G.Ex. 7A-3; p. 2; T-3611, 4279). Mr. Feinberg testified that his statement during the conversation, that he would take care of the disclosure issue, was meant only to appease the Arabs. (T-3608-09)[9/]. The meeting concluded with a vague agreement that new corporations should be established and that the Arabs would buy out Torriello and Garrett. (T-816-17, 3613-14).

That evening Weinberg tried again by telephone. He insisted that Mr. Feinberg provide him with another name in which to place the Senator's stock.

9/ Mr. Feinberg's testimony as to his state of mind at this time and during the course of the Weinberg/F.B.I. scenarios is most interesting: "Well as far as I was concerned, again, was going — I constantly was under pressure from these people about this subject matter. I was trying to placate them because I wanted this thing to succeed. I believed in it. I believed in them and when you believe in — you want to believe and I did." (T-3608-09, 3642-43).

Feinberg put him off. (G.Ex. 8A, pp. 1-2). Mr. Feinberg later informed Weinberg that the Senator wished to have his shares placed in his own name and interest disclosed. (F.Ex. O, p.2).

Weinberg continued to demand that no shares be issued in Senator Williams' name. (T-3618-19),and in fact, made financing of the venture expressly contingent on this condition.

On cross-examination, Weinberg confirmed that, in his opinion, Mr. Feinberg did not have the power and guts to do what he and Amoroso asked of him. (T-1370). Thus, it is evident by Weinberg's own testimony that although he was finally able to coerce Mr. Feinberg into saying things to appease him, even Weinberg realized that Mr. Feinberg would not follow through with an improper act. More coercion was applied.

Weinberg next requested that Mr. Feinberg prepare resumes of all interested parties for the Sheik. He insisted that the Senator's resume include a statement that the Senator would guarantee government contracts. (T-3626). Mr. Feinberg never prepared such a resume and was severely reprimanded by Amoroso for not doing as the Arabs wished. (G.Ex. 10A, p. 5).

A meeting was called in June by Amoroso allegedly to discuss the new corporations. Prior to this meeting, Weinberg emphasized to Mr. Feinberg that the Senator's guarantee of government contracts was crucial to obtaining financing of theproject from the Arabs. Weinberg and Amoroso were particularly angered when Mr. Feinberg insisted again that the Senator would take the shares in the new corporations in his own name and disclose his interest. (G.Ex. 10A, p.3). Displeasure deepened into anger when Mr. Feinberg presented

them with a memorandum in which the Senator extolled the virtue and integrity of the mining venture. (T-3630). They stated that this was insufficient to satisfy an Arab, who, according to Weinberg, "can't read between the lines". Amoroso took Mr. Feinberg to task in no uncertain terms for his unwillingness to "take care of things" as they wished. (G.Ex. 10A, p. 5, T-3635).

Weinberg and Amoroso then attempted to get the Senator to say what Mr. Feinberg would not write. They arranged a meeting between the Senator and the Sheik. Weinberg emphasized that at the meeting the Senator must "come on strong", and indicate that he would guarantee government contracts. (G.Ex. 10A, p. 7; T-3641). When Errichetti forcefully repeated the demand that the Senator must "come on strong" in order to impress the Sheik, (T-3639-40, 4285), the Senator felt that Errichetti was asking him to do something out of character and stated he would speak to the Sheik in his own way. (T04285).

In response to Weinberg's continuing pressure, Mr. Feinberg attempted to assure him that the Senator would act as they wished. Despite the assurances, Mr. Feinberg testified that the Senator did not intend to guarantee contracts or do any more than make telephone calls or introductions. (T-3640-41). Obviously, Weinberg did not believe Feinberg's "assurances" since on that same date, Weinberg again stressed to Katz that even further pressure would have to be placed on the Senator. (F.Ex. G., p. 1).

A few days before the Senator's meeting with the Sheik, Weinberg contacted Mr. Feinberg to once again emphasize that the Senator must "come on strong". (G.Ex. 12A). It was Mr. Feinberg's belief that although the Senator would not

"come on strong", he would convince the Sheik that the project was truly a great one. (T-3642).

On the evening of June 27th, Errichetti and Mr. Feinberg, along with Weinberg and Katz met at the Marriott Inn in Arlington, VA. Weinberg once again insisted that the Senator say that he would guarantee the government contracts. (T-3644-48; G.Ex. 13A, p. 8).

The conversation between Errichetti, Weinberg, and Katz after Mr. Feinberg left for the evening, is indicative of the lengths to which the other parties were going in order to overcome the Senator's and Mr. Feinberg's reluctance to acede to Weinberg's demands:

> AE: I got Pet [Senator Williams] by the fucking throat, I tell you about as close as I cam in his office. Let me tell you something, cock-sucker, don't you go fucking this thing up. I got a chance to make a fucking million dollars, you prick. All you're gonna do is give a fucking speech like you never gave in your life and there's not much left to say. You're gonna fucking guarantee that fucking contract. (Inaudible) I said you're gonna fucking say it. I don't give a fuck. Never mind about doing it. You're gonna fucking say it.
>
> (F.Ex. H) [Emphasis added]

On June 28th, Mr. Feinberg met briefly with the Senator before Weinberg and Amoroso quickly ushered the Senator off to meet the Sheik. Unbeknownst to Mr. Feinberg, the Senator had been given a lengthy coaching session by Weinberg on what he should say and do. (G.Ex. 14A). Senator Williams was instructed by Weinberg to stress his position in the Senate, his prominence, and the fact that he could do favors. The Senator was informed that it was imperative he tell

the Sheik that he could exert influence to get the contracts, even though the speech was all "bullshit". As Weinberg put it, the Senator was to be "on stage for twenty minutes". Weinberg cynically characterized him as "the most expensive TV star that ever got paid". He urged the Senator to "throw names, be a star, it was 'the Arab way'." Mel even wore a tie for the occasion. (T-4305, 4328).

By his own admission, in his meeting with the Sheik, the Senator foolishly bragged about his position in the Senate, his relationship to other members of Congress, and his ability to get things done. (T-4360). Although the Senator knew virtually nothing about titanium, he attempted to impress the Sheik with the importance of the metal. (G.Ex. 15A). At trial, he characterized much of what transpired in this meeting as "baloney". (T-4369-71, 4378). However, when Amoroso suggested that the Senator's interest in the mine be concealed, the Senator responded by firmly emphasizing the position he had taken at the Hotel Pierre - based upon Mr. Feinberg's advise, he intended to declare his interest as soon as the project obtained financing and became meaningful. (T-4351).

Subsequently, it was agreed that Mr. Feinberg would establish certain corporations for the purpose of acquiring the Savannah and Piney River properties. Mr. Feinberg would prepare the necessary papers for the stockholder's meeting including the requisite stock certificates. No stockholder agreement was ever prepared. (F.Ex. T; T-3652). While insisting to Weinberg that all corporate formalities must be observed, he did agree to Weingerg's demand that the Senator's certificates be in blank, for the time being. (G.Ex. 17A, pp. 2-3)

Prior to the stockholders' meeting, and without Mr. Feinberg's knowledge, Weinberg offered Sandy Williams $20,000.00 expense monies to be paid to the Senator. The Senator refused. (G.Ex. 18A, p.2).

On July 11th, a lengthy stockholders' meeting was held at JFK airport. Present were Mr. Feinberg, Erricheti, Weinberg, Amoroso, Katz, William Evoy, and Sandy Williams. Three corporations were created. Cross-examination of Amoroso and Weinberg confirmed that all issued stock was worthless. (T-1168-69, 1363-64, 3569, 3567, 3664-65). Mr. Feinberg held the Senator's worthless shares in trust for him. (T-3659). At Weinberg's and Amoroso's request the stock certificates were conveyed to them, allegedly to be shown to the Sheik. (T-3659). The stock certificates at JFK Airport on August 5th, prior to a departure for Europe. (G.Ex. 21A, p.4).

E. The F.B.I. Resale

Having been unable to coerce or bribe Mr. Feinberg or the Senator into committing an incriminating act, in August 1979, the F.B.I. upped the ante with yet another scam. This time, a pretended sale of the mine to a second group of phony Arabs. (T-1170). Weinberg began this scam by informing Mr. Feinberg and Katz that a separtate group of Arabs was interested in purchasing the mine at a profit of some seventy million dollars. The profit would be realized at simutaneous closings. (T-1635, 3666-68). Weinberg and Amoroso arranged a meeting on September 11, 1979, with Erricheti, Katz, Mr. Feinberg, Sandy Williams and the Senator. (G.Ex. 23A; T-3669). At this meeting, Weinberg and Amoroso skillfully launched the resale scenario emphasizing that the resale would net the parties seventy million dollars. (G.Ex. 23A, p.18; T-3670). Fearful that seventy million dollars wouldn't be enough, Weinberg also suggested a tax evasion scheme. However, his Swiss bank scheme was flatly rejected. (G.Ex. 29A, pp.60-65; T3674-75).

Weinberg insisted that if the resale was successful, the Senator must stay with the new entity in the same capacity as the persent venture. (G.Ex. 23A, p.29). Weinberg emphasized that the resale depended on the Senator obtaining the government contracts. (G.Ex. 23A, p.29; T-3672, 4453-56). When the meeting dispersed, the corporations had no assets and the stock continued to be worthless. (T-3688). It was decided at the meeting that they would go ahead with the resale.

F. The Ritz Carlton Transaction

In late 1979, the New Jersey Casino Control Commission was considering an application by the Ritz Carlton which would permit the Atlantic City Ritz to be rebuilt rather than razed. (T-3679-81). Senator Willisms' wife, Jeanette, contacted Mr. Feinberg and requested any assistance that Mr. Feinberg could render in support of the Ritz' application. (T-3682).

It was the general policy of the Casino Control Commission to invite comment and input from the public on all pending applications. (T-3681). Because he was personally acquainted with Ken McDonald, the Vice-Chairman of the Commission, Mr. Feinberg chose to meet with him to persent the merits on behalf of the Ritz. (T-3682-83). Mr. Feinberg perfaced his remarks by stating that if he were "out of order" McDonald should let him know. (T-3682). IU a short conversation, Mr. Feinberg presented to McDonald the reasons why the Ritz should be allowed to renovate rather than tear down the existing structure. McDonald indicated he would look into the matter. Mr. Feinberg thanked him and left. The Ritz Carlton's application to renovate was ultimately approved. (T-3684-85).

Subsequently, Mr. Feinberg was appointed counsel for the Ritz in New Jersey. (T-3686). In his capacity as general counsel for the Ritz, Mr. Feinberg became aware of the difficulties encountered by the Ritz in obtaining financing for the Casino. The Ritz was in need of some seventy million dollars.

Since Senator Williams was a personal friend of the Chairman of the Board of the Hardwick Corporation, which owned the Ritz Carlton, and the Senator's wife was a paid consultant to Hardwick in 1979, the Senator also was aware that the Ritz was seeking financing. (T-4487-94, 4497-99). At Mr. Feinberg's request he attended the meeting with Weinberg and Amoroso during which Mr. Feinberg presented documents in support of the Ritz' application for a loan. (T-4500). In the course of discussion, Mr. Feinberg stated that he believed there would be no problem in obtaining a gaming license for the casino. At trail, he testified that this opinion was based on his knowledge that the principals were of high repute. (T-3696-97). He then attempted to impress Amoroso and Weinberg by enaggerating the influence he had had on the grant of the Ritz' application to renovate. (G.Ex. 24A. pp.9, 11-12, 17-18).

Weinberg's own assessment that the principals owned nothing of value at that time was one of the few true statements ever made by him. (G.Ex. 23A, pp. 58-59; T-2673). Joseph Fusco testified that he was the staff member responsible for making recommendations as to the Ritz Carlton applications. He testified that he handled the Ritz application personally and that the Commission adopted his recommendations. (T-3241, 3245). He did not know the Senator at the time of the granting of the Ritz application. He stated that neither the Senator, Jeanette Williams. nor Mr. Feinberg had any influence on the granting of the permit. (T-3246-49). Fusco specifically noted that Mr. Feinberg had no dealing with Fusco's office. (T-3248-49). Mr. Fusco further testified that no outside influence was ever attempted to be brought to bear on the Commission and the decision was reached by the staff solely on the merits. (T-3276-82). Mr. Fusco also testified that the permit application submitted by the Ramada, and building had structural difficulties. (T-3231).

Weinberg indicated that any loan provided by the Arabs would be available at an attractive rate of interest of two points above prime. (T-3713-14). Weinberf further indicated that if the Arabs financed the transaction, a finder's fee of three million dollars would be reasonable. (G.Ex. 24A, p.23; T-3697). The Senator testified that this was the first he had heard of a finder's fee. (T-4509).

As in the Piney River transaction, Weinberg insisted that the Senator's interest in this venture must be concealed. The Senator, however, once again, clearly indicated that he intended to disclose his interest. (G.Ex. 24A, p.41; T-4518-20). At this juncture Amoroso and Weinberg raised the subject of Piney River. Again they warned the Senator that his wish to declare his interest in that project would ruin the chances of selling the property to the second group of Arabs. (G.Ex. 24A, p.44). It was agreed that Weinberg and Amoroso would look into the possiblity of financing the Ritz, but the F.B.I. abandoned this scenario. (T-3741).

G. The F.B.I. Asylum Scam

In early January, Weinberg called Mr. Feinberg to request a personal favor for Sheik Yassir. Shortly thereafter for the purpose of ascertaining what the "favor" was, Mr. Feinberg and Katz met with Amoroso and Weinberg at the Plaza. (T-3717). During the conversation it was revealed that the Sheik was seeking permanent residency in the United States. Amoroso suggested that a private immigration bill could be introduced by the Senator. (T-3719). Mr. Feinberg knew nothing about private immigration bills. He told Weinberg and Amoroso that before any action could betaken, the Senator would need a complete background of the individual requesting assistance. (T-3719). Amoroso assured him that there was nothing in the Sheik's background that would prohibit entry into this country. (T-3719). Mr. Feinberg agreed to contact the Senator and did so.

On January 19, 1980, Mr. Feinberg informed Amoroso that the Senator would meet with the Sheik the next day. (T-3721). Mr. Feinberg insisted again that the matter had to be handled legitimately. (F.Ex. V; T-3721).

The Senator attended the meeting accompained by Sandy Williams, Katz and Mr. Feinberg. After a short introduction, the Senator was left alone with Amoroso and Special Agent Farhardt, posing as the Sheik. They offered the Senator money. The Senator flatly rejected the offer without hesitation. (G.Ex. 24A). Sentor Williams indicated that he would assist the Sheik only if the Sheik's claim of hardship was verified by his staff. The meeting concluded with Amoroso agreeing to supply the request information.

H. The Joe Silvestri Conversation

On February 21, 1980, F.B.I. Agents visited and interviewed Mr. Feinberg at his home. (T-3726, 3804). After being advised of his rights, Mr. Feinberg expressed his desire to cooperate fully with them. (T-3801). A far ranging involvement with the Ritz Carlton Casino and the Piney River projects. (T-3730, 3797-99, 3801). Mr. Feinberg chronicled his relationship with the Arabs from the date of their first meeting. Mr. Feinberg assured the agents that the Senator had intended to disclose his interests in the projects and he had never intended to use his position to obtain government contracts. (T-3734). He insisted that neither he nor the Senator had done anything wrong. (T-3801-02)

In the course of the interview, Mr. Feinberg also discussed his relationship with Joseph Silvestri, a housing contractor. Silvestri had been interested in obtaining financing for the Dunes Casino. (T-3727).

Sometime later, Mr. Feinberg called Joe Silvestri. That evening, Silvestri returned the call while seated in Mr. Puccio's office. Unbeknownst to Mr. Feinberg, Silvestri had been instructed by the Justic Department to lie about his whereabouts and the attempt to induce Mr. Feinberg to lie or incriminate himself. (T-3737-38). The specific effort was directed toward asking Mr. Feinberg what Mr. Feinberg would wish Silvestri to say to the F.B.I., if he, Silvestri, were questioned by them. (T-3740). Mr. Feinberg initially informed Silvestri that the Arabs were actually Government Agents. He further stated that during his interview with the F.B.I., he had discussed Silvestri's role in the Dunes financing project. (F.Ex. W, pp.2-5). Silvestri, then asked what he should do if contacted by the F.B.I. Feinberg replied, "Just tell'em the truth".

REASONS FOR GRANTING THE WRIT

POINT I

THE METHODS EMPLOYED BY GOVERNMENT AGENTS IN THE COURSE OF THEIR INVOLVEMENT WITH PETITIONER WERE OUTRAGEOUS AND OVERREACHING, CONSTITUTING A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS

Since it first enunciated the entrapment defense in Sorrells v. United States, 287 U.S. 435 (1932), the Supreme Court has been divided on the factors which should be considered in establishing such a defense. In Sorrells, the Court held that a finding that the Government had induced the defendant to commit a crime was not, in itself, sufficient to sustain the entrapment defense. In addition to the inducement, the defendant must not have been predisposed to commit the crime charged.

Recognizing that this construction of the entrapment defense would afford the Government too much latitude, the Court enlarged the potential scope of the defense in United States v. Russell, 411 U.S. 423 (1973). There the Court warned that, even when a defendant was predisposed to commit the offense, a situation could exist in which "....the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction." Id at 431-432.[10/]

In the subsequent decision of Hampton v. United States, 425 U.S. 484 (1976), the Court rejected a defendant's assertion of a due process defense based on government misconduct. A plurality of the Court concluded that the defense of entrapment was the sole remedy available to a criminal defendant. However, just as significantly, the concurring

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10/ Following Russell, several Circuits invoked due process principles as a basis for overturning narcotics convictions where government agents had supplied the contraband to the defendants. United States v. West, 511 F.2d 1083 (3rd Cir. 1975); United States v. Mosley, 496 F.2d 1012, aff'd on rehearing 505 F.2d 1251 (5th Cir. 1974).

and dissenting Justices, constituting a majority, held that due process was still a viable defense where there has been government misconduct. Justice Powell, in his concurrence, affirmed that "there is certainly a constitutional limit to allowing Government involvement in crime", 425 U.S. at 493, n. 4 (quoting United States v. Archer, 486 F.2d 670 (2d Cir. 1973).[11]

Although reaching its decision on other grounds, the Second Circuit in Archer had issued a stern warning regarding future misconduct by agents of the government. Judge Friendly clearly indicated that government agents who "displayed an arrogant disregard for the sanctity of the state judicial and police process did indeed, violate the principles of due process." Id at 677. Furthermore, the availability of a due process defense, when the government involvement in criminal activities has reached the level of outrageousness, has been recognized by the Third, Ninth, Fifth, and Eighth Circuits. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. Prairie, 572 F.2d 1819 (9th Cir. 1976); United States v. Graves, 556 F.2d 1319 (5th Cir. 1977); United States v. Quinn, 543 F.2d 640 (8th Cir. 1976).

Among the relevant factors to be considered when a defendant has raised the due process defense are (1) the defendant's prior lack of criminal involvement;[12] (2) the extent of the government's involvement in criminal activities; and (3) the persistence of the government in its attempts to entrap the defendant. United States v. Twigg, supra; United States v. Graves, supra at 1319; United States v. Batres-Santolino, 521 F.Supp. 744 (N.D. Cal. 1980).

11/ In the view of the concurring Justices, however, the particular acts by the government in Hampton did not violate due process, 425 U.S. at 495.

12/ Notably, most of the cases rejecting an outrageous government conduct defense involved defendants who had previously been involved in similar crimes or ongoing criminal enterprise. See, United States v. Russell, 411 U.S. 423 (1973); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980), cert denied 101 S.Ct. 863 (1981).

A. The Size of the Inducement

In its efforts to lure Petitioner into criminal activities the Government created an escalating series of inducements which offered Petitioner wealth beyond his wildest dreams. Initially, Abdul Enterprises was to provide a $13,000,000.00 loan which would have rendered the Piney River mine operable. Shortly thereafter, Weinberg indicated that the Arabs might also be interested in providing additional financing of some seventy million for the purchase of the Cyanamid property. Seventy million was also offered for the Ritz Casino financing.

Just in case a loan of $100,000,000.00 was not enough to convince Petitioner to do things "the Arab way", the Government created the resale scam. The resale which was, of course, contingent on the Senator's non-disclosure and procurement of Government contracts would net the principals a profit of seventy million dollars. All of the sums offered were mind boggling beyond anyone's wildest dreams.

Yet another offer of financing was made for the Ritz Carlton renovation project. Weinberg expressed the willingness of the Arabs to provide another loan for $70,000,000.00 at two points above the prime interest rate. Mr. Feinberg would earn a finder's fee of three million dollars if the financing materialized.

The incredible amount of these inducements cannot be considered the same kind of ordinary temptation that Assistant Attorney General Hyman found to be just "floating out there". [Meyers D.P. Ex. 1W (cited in United States v. Kelly, Slip. Op. No. Cr. 80-00340, n.47 (D.C. May 13, 1982)]. Defense counsel attempted to have the size of the inducement

considered by the jury. However, the trial court rejected this request to charge. (Feinberg's Request to Charge: Ct. Ex. 15, Request No. 1). Significantly, the extent of the inducements offered were not monitored by anyone in the F.B.I. or the Justice Department. It would appear that Mel Weinberg was free to offer whatever the traffic would bear.

B. The Instigation and Persistence of the Government

In striking contrast to the defendants in Sorrells, Sherman, Russell and Hampton, Petitioner was not engaged in an ongoing course of criminal conduct. Petitioner was merely seeking financing for a mining venture from which he hoped to make a legitimate profit. It was the Government agents who, at every turn, insisted that the desired financing be contingent upon the commission of the crimes charged.

The shareholders in the mine had originally contemplated selling the titanium to paint manufacturers. Once Weinberg learned of the military uses for titanium, he injected the issue of government contracts into the transaction.

The night before the Hotel Pierre luncheon, and just as the long-awaited financing was on the verge of becoming a reality, Weinberg raised the issue of government contracts. He did not merely suggest that it would be advantageous for the Senator to attempt to procure government contracts; he insisted on it. Time and time again, Weinberg stressed that the success of the financing was wholly contingent on the Senator's promise that he would procure these contracts.

Mr. Feinberg made it clear from the start that the Senator would not-could not - procure government contracts. However, to appease the Arabs and preserve the chances for financing, Petitioner indicated that the

Senator would "make introductions" to assist in the mining venture. He never promised to procure government contracts. Petitioner adhered to this position throughout a lengthy period, despite ceaseless pressure in the context of mind boggling inducements by the Government to make such a guarantee.

On the issue of disclosure, it was Weinberg and the F.B.I. again, that insisted on the concealment of the Senator's interest. Petitioner, Feinberg, despite the manipulation of Weinberg, and the F.B.I. postponed on the disclosure issue until he had had an opportunity to consult with a tax attorney and examine the Senate Rules on Disclosure. After careful consideration, Mr. Feinberg and the Senator determined that the law did not demand disclosure of the Senator's interest until such time as the shares attained some monetary value. Petitioner consistently stated that at that time the Senator intended to declare his interest and pay taxes on any profits.

As Petitioner was being continually manipulated with demands that he commit these crimes the rewards for doing so sky-rocketed higher and higher. The original loan for thirteen million dollars ultimately mushroomed to $170,000,000.00. The attainment of financing for the Ritz would have personally netted Petitioner an additional $3,000,000.00. Dispersed among these major inducements were more mind tests, designed by the Government. The Senator was offered the use of Abdul Enterprises corporate jet, $20,000.00 in expense monies and an unspecified bribe for obtaining residency for the Sheik. All of these offers were flatly rejected. Weinberg also suggested that the purported resale of the mine be transacted overseas, in order to avoid taxation on the profits. All principals in the venture, including Petitioner, rejected this scheme without hesitation.

Time and again Petitioner was tested; time and agin he refused to commit any crime. As the Court stated in Williamson v. United States, 311 F.2d 411, 445 (5th Cir. 1962): "There comes a time when enough is more than enough - it is just too much." These sentiments were echoed by Judge Bryant in his decision setting aside the conviction of Abscam defendant John Kelly:

> "A suspicion - free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery...If the Government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of offensiveness to that of being outrageous."
>
> United States v. Kelly, (Slip Op. See, United States v. Klosterman, 248 F.2d 191 (3rd Cir. 1957).

The Second Circuit has long recognized the significance of persistent effort on the part of the Government.

> "The degree of pressure is properly considered under the element of propensity, as it has direct bearing on the accused's willingness to respond to the inducement of the agent."
>
> United States v. Viviano, supra at 299 n.2.

In the opinion below, the Second Circuit noted that the size of the inducement in this case distinguished it from other Abscam convictions. Nevertheless, the Court held that:

> "We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator."
>
> (Appendix A, p. 36)

To an attorney with a general practice in southern New Jersey, however, the amount of money being offered by government agents represented greater wealth than he ever imagined he could attain.

More importantly, Mr. Feinberg initially anticipated realizing these tremendous profits through a totally legitimate business venture. The government first raised his hopes of making enormous sums of money and — when his hopes and dreams had been aroused — made the success of that venture wholly contingent on the commission of an illegal act. In so doing, the government administered the ultimate "Morality Test" to ascertain just how great a temptation would cause a law-abiding citizen succumb.

The conduct of government agents in arousing the anticipation of profits from a legitimate venture, then injecting illegality into the venture, escalating the size of the inducement, and persistently insisting that an illegal act be committed, constitutes outrageous and overreaching behavior which violated Petitioner's right to due process.

POINT II

A DEFENDANT'S PREDISPOSITION CANNOT BE PROVEN BY THE INTRODUCTION OF NON-CRIMINAL ACTS OR BY VIRTUE OF THE DEFENDANT'S RESPONSE TO THE GOVERNMENT'S SUGGESTION OF CRIME, FOLLOWING MONTHS OF ENTICEMENT BY THE GOVERNMENT.

Once the defense of entrapment had been raised, it was incumbent upon the Government to prove, beyond a reasonable doubt, that Alexander Feinberg had been predisposed to commit the crime charged in the indictment. United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976); United States v. Viviano, 437 F.2d 295 (2d Cir.), cert. denied, 402 U.S. 983 (1971). Since the existence of inducement was never in doubt, it was clear from the outset that the Government's success in proving predisposition would determine the outcome of this case. Traditionally, predisposition has been proven through the introduction of prior convictions or arrests, or testimony of government agents who had witnessed the commission of other crimes. However, in the instant case that method was not available to the Government. They were faced with a defendant who was a respected attorney with an exemplary record. The government met this challenge by introducing evidence of numerous legitimate business transactions as "similar acts", allegedly probative of Petitioner's criminal predisposition.

A. The Legitimate Nature of the Similar Acts

By a repeated distortion of the facts, culminating in an inflamatory summation, the Government succeeded in convincing the jury that Petitioner had a long history of involvement in illegal activities and was, therefore, predisposed to commit the crimes charged. In reality, each of the similar acts introduced by the government was a legitimate business transaction.

Proof of this contention, regarding the Ritz Carlton transaction, was provided by the Government itself. At the due process hearings, testimony elicited by defense counsel revealed that at the exact time it was seeking to introduce this transaction as relevant to predisposition, the government had in its files a documents which has become known as DP Ex. 24. This Exhibit was a memorandum in which Assistant United States Attorneys Plaza and Weir concluded that there was no impropriety in Mr. Feinberg speaking with Ken McDonald on behalf of the Ritz Carlton's application for permission to renovate the casino. The memorandum was based on F.B.I. 302's which contained the findings of an independent investigation conducted at the request of the Strike Force.

Regarding Petitioner's involvement in Biocel, the only charges of impropriety were levelled during the course of a political campaign. These allegations were totally unsubstantiated. Both Petitioner and Sandy Williams denied any wrong doing at trial.

Mr. Feinberg's conversation with Joe Silvestri clearly indicated that he was confident nothing illicit had transpired during the search for financing for the Dunes Casino. With regard to the Garden State Raceway, Mr. Feinberg also desired to assist in obtaining financing, but rejected Errichetti's and Weinberg's suggestions that pay-offs be required to ensure the success of the venture.

Mr. Feinberg learned of each of these proejcts in the course of his legal practice in southern New Jersey. His application for permits on the part of the Biocel were within the scope of his duties as corporate counsel. His activities in attempting to locate sources of financing for the Dunes, Ritz Carlton and the Garden State Raceway were those of any businessman and there was nothing illegal or improper in any of Petitioner's actions.

Nevertheless, the government through unfounded assertions and innuendo, presented these ventures as examples of Petitioner's prior criminal conduct.

B. The Similar Acts Evidence Was Inadmissible To Prove Petitioner's Predisposition

The United States Supreme Court has long held that when the defense of entrapment has been raised:

> "The accused will be subjected to an appropriate and searching inquiry into his own conduct and predisposition."
>
> Sherman v. United States, 356 U.S. 369, 373 (1958).

The introduction of similar acts evidence has been almost universally considered permissible for the purpose of rebutting an entrapment defense.[13/]

The only states which do not permit similar acts evidence to be admitted on the issue of predisposition in an entrapment case are California and Iowa. See, People v. Rodriquez, 243 Cal. App. 522 (1966); People v. Mullen, 216 N.W.2d 375 (1974).

It is not necessary that the prior crimes, relevant to predisposition, be the same as the crime charged. However, the prior conduct must be "morally indistinguishable" from the crime charged and "of the same kind". United States v. Viviano, 437 F.2d 295, 299 n.3 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952); United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1938).

13/ The Circuits are uniform in their acceptance of this rule. See Whiting v. United States, 296 F.2d 512 (1st Cir. 1961); United States v. Sherman, 240 F.2d 949 (2d Cir.), rev'd on other grounds, 356 U.S. 369 (1958); United States v. Johnson, 371 F.2d 800 (3rd Cir. 1967); United States v. Simon, 488 F.2d 133 (5th Cir. 1973); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); United States v. Stocker, 273 F.2d 754 (7th Cir. cert. denied, 362 U.S. 963 (1960); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied, 405 U.S. 978 (1972); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); United States v. Freeman, 412 F.2d 1181 (10th Cir. 1969); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962).

Subject to the requirements of Rule 403 FRE, prior convictions for similar offenses have been held admissible. Nutter v. United States, 412 F.2d 178 (9th Cir.) rev'd on other grounds, 356 U.S. 369 (1958); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952). Although the distinction between a felony conviction and misdemeanor conviction may be determinative o the admissibility of similar acts for the purpose of impeachment, this distinction has no significance when such evidence is introduced to prove predisposition.

Furthermore, the defendant need not have been convicted of the prior crime which is admitted to prove predisposition. In such instances, testimony has generally been offered by an undercover government agent who has witnessed the defendant participating in an illegal activity. United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972); United States v. Brown, 453 F.2d 101 (8th Cir. 1971). cert. denied, 405 U.S. 978 (1972); United States v. Smith, 283 F.2d 760 (2d Cir.),cert denied 365 U.S. 851 (1960). Occasionally, an informant has testified to having witnessed the defendant commit prior similar crimes. United States v. Simon, 453 F.2d 111 (8th Cir. 1971). In some cases, the defendant's own out-of-court admissions of having committed prior crimes have been admitted on the issue of predisposition. United States v. Demetre, 464 F.2d 1105 (8th Cir. 1972); Dege v. United States, 308 F.2d 534 (9th Cir. 1962); United States v. Stocker, 273 F.2d 754 (7th Cir.), cert denied, 362 U.S. 963 (1960).

Some circuits have allowed government agents to testify regarding an informant's disclosure of the defendant's prior criminal conduct. Rocha v. United States, 401 F.2d 529 (5th Cir. 1968), cert. denied 393 U.S. 1103 (1969); Trice v. United States, 211 F.2d 513 (9th Cir.), cert denied 346 U.S. 900 (1954). However, other circuits have excluded such hearsay testimony on the grounds that its questionable probativity as to pre-

disposition was far outweighed by its prejudice to the defendant. Johnston v. United States, 426 F.2d 112 (7th Cir. 1970); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Whiting v. United States, 296 F.2d 512 (1st Cir. 1961).

It is significant to note that whenever a defendant's prior acts for which he had not been convicted were admitted to prove predisposition, these acts were always clearly criminal in nature. Such evidence has been most commonly admitted when it indicated the defendant's past involvement in drug transactions. United States v. Smith, 283 F.2d 760 (2d Cir.), cert denied, 365 U.S. 851 (1960); United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied, 425 U.S. 978 (1972); Rocha v. United States, 401 F.2d 529 (5th Cir. 1968), cert. denied, 393 U.S. 1103 (1969); United States v. Cooper, 321 F.2d 456 (6th Cir. 1963); Trice v. United States, 211 F.2d 513 (9th Cir.), cert denied, 346 U.S. 900 (1954).

Testimony regarding a defendant's commission of crimes for which he has not been convicted has also been admitted when the prior acts constituted: (1) bribery, United States v. Viviano, 437 F.2d 295 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971); (2) illegal manufacture of liquor, Billingsley v. United States, 274 F. 86 (6th Cir.), cert. denied, 257 U.S. 656 (1921); (3) smuggling, Dege v. United States, 308 F.2d 534 (9th Cir. 1962); (4) forgery, United States v. Demetre, 464 F.2d 1105 (8th Cir. 1972); and (5) illegal acquisition of firearms, United States v. Cohen, 489 F.2d 945 (2d Cir. 1973). In each of these instances, the defendant's prior conduct was unequivocally illegal.

In striking contrast, Petitioner's previous attempts to obtain permits for Biocel or the Ritz Carlton and secure financing for Biocel,

the Ritz, the Garden State Raceway and Piney River were legitimate business activities.

Research has failed to uncover any case in any circuit where prior similar acts, which did not clearly constitute a crime, were admitted to prove a defendant's criminal predisposition.

There is no way that Petitioner's behavior can be characterized as a "ready response" to the Government's inducements. At the Hotel Pierre, when the issue was first raised, Petitioner made it clear that the Senator would not guarantee the procurement of government contracts. He adhered to this position over a period of several months despite the insistence of government agents that the proposed financing was contingent on the Senator making this guarantee.

When the issue of disclosure was initially raised by Mel Weinberg, Petitioner, again, resisted his demands. No decision was made until Petitioner had consulted a tax attorney and the Senate Rules on Disclosure. After careful evaluation, Petitioner and the Senator determined that the Senator's interest in the Piney River and subsequent ventures, need not be disclosed until his shares had developed value. However, Petitioner and the Senator consistently stated that he would disclose his interest as soon as the ventures became viable. This position directly contravened the demands of the Arabs.

Petitioner was clearly unwilling to yield to the series of inducements created and orchestrated by the Government. In the face of an overwhelming onslaught of temptations and demands, Mr. Feinberg made consistent efforts to keep all dealings with the Arabs legitimate. Thus, the only alternative which remained open to the Government was to prove Petitioner's predisposition by the introduction of similar acts evidence.

Despite these facts the Second Circuit held the similar act evidence introduced in the instant case to be admissible. The impact of that decision is that when the defense of entrapment is based in the future, predisposition may be proven by prior conduct which is not criminal.

C. The Time When Predisposition is Assessed

The Second Circuit's decision in Petitioner's case impinges upon the entrapment defense in still another way.

During the course of jury deliberation, the following inquiry was made:

> "Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?"

The District Court responded as follows:

> "The inducement question here is a matter of law. It is not a problem you even have to worry about. It is there. The only question that you have to decide in order to answer the element of entrapment is was the defendant predisposed to commit the crime. You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he."

The Second Circuit held that the time for assessing predisposition is the time when the criminal opportunity first appears. The Court determined that this time was May 31st, when Petitioner and the Senator were first told that the availability of financing was contingent on guaranteeing government contracts. According to the Court, Petitioner made a ready and willing response at that time.

Although Petitioner would quarrel with this characterization of his

response, for purposes of this Petition attention will be directed only at the Second Circuit's determination of the time at which predisposition should be assessed.

By judging Petitioner's predisposition at the time the demand for a guarantee of contracts was made, the Court discounted the months of time and energy invested by the government in creating an inducement. Initially the government offered financing of thirteen million dollars for a legitimate mining venture. Then additional financing of seventy million dollars was offered for the Cyanamid plant. It was only after the government had succeeded in creating anticipation and hopes for wealth that its agents injected the element of criminality. But a sophisticated scenario, creating a series of tantilizing inducements had been set in motion months earlier.

Predisposition must exist before the period of inducement and persuasion begins. As the First Circuit has correctly noted:

> "Obviously, an entrapped defendant will always be willing and ready to commit the offense after the inducement and immediately before the crimes commission."
>
> United States v. Parisi, 674 F.2d 126, 128 (1st Cir. 1982).

The Second Circuit's decision in Petitioner's case clears the way for the government in the future to go to any lengths in orchestrating inducements to tempt and entrap an unsuspecting citizen - and to do so with impunity.

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that this Writ of Certiorari be granted.

Respectfully submitted,

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Dated: New York, N.Y.
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No. 83 5108

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALEXANDER FEINBERG,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent

APPENDIX TO PETITIONER FEINBERG'S
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 168, 424 - August Term, 1982

Argued: October 7, 1982 Decided: Dec 5, 1983

Docket Nos. 82-1111, 82-1123

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UNITED STATES OF AMERICA,
Appellee,

v.

HARRISON A. WILLIAMS, JR.
and ALEXANDER FEINBERG,
Defendants-Appellants.

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Before: FRIENDLY, NEWMAN, and KEARSE, Circuit Judges.

Appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge), after a jury trial at which a former United States Senator and his associate were found guilty of bribery and related offenses arising out of the Abscam investigation.

Affirmed.

Erwin N. Griswold, Washington, D.C., and George J. Koelzer, New York, N.Y. (Claire L. Shapiro and Jones, Day, Reavis & Pogue, Washington, D.C., and Joel N. Kreizman, John P. Croake, and Evans, Koelzer, Marriott, Osborne & Kreizman, New York, N.Y., on the briefs), for defendant-appellant Williams.

Carol Prendergast, New York, N.Y. (Harry C. Batchelder, Jr., Susan D. Bauer, Glenn Bogdonoff, and Shelly R. Rossoff, New York, N.Y., on the brief), for defendant-appellant Feinberg.

Edward R. Korman, U.S. Atty., Brooklyn, N.Y. (Edward A. McDonald, Atty-in-Charge, Organized Crime Strike Force, Lawrence H. Sharf, Sp. Atty., and Gregory J. Wallance, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

NEWMAN, Circuit Judge:

Harrison A. Williams, Jr., formerly United States Senator from New Jersey, and Alexander Feinberg, an attorney and close friend of Williams, appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge) after a jury trial on bribery and related charges arising out of the Abscam undercover "sting" operation. We have previously explored the factual background of Abscam and many of the legal issues arising from this controversial undertaking in upholding the sufficiency of the indictments against four Congressmen and three of their associates, United States v. Myers, 635 F.2d 932 (2d Cir.) (Myers I), cert. denied, 449 U.S. 956 (1980); United States v. Murphy, 642 F.2d 699 (2d Cir. 1980), and in affirming their convictions, United States v. Myers, 692 F.2d 823 (2d Cir. 1982) (Myers II), petitions for cert. filed, 51 U.S.L.W. 3554, 3555, 3567 (U.S. Jan. 14, 17, 1983) (Nos. 82-1183, -1199, -1255). The evidence against Williams and Feinberg differs in significant respects from that presented in previous Abscam trials, but the major legal issues are similar. In light of our holdings in Myers I and Myers II

and for the more particular reasons detailed in this opinion, we affirm the judgments of conviction.

I.

Williams and Feinberg were charged in a nine-count indictment, along with co-defendants Angelo J. Errichetti, formerly Mayor of Camden, New Jersey, and George Katz, a New Jersey businessman.[1/] Errichetti was severed after his conviction in the Myers trial, and Katz was severed for health reasons and has since died. The indictment alleged a conspiracy and eight substantive violations, arising out of Williams' conduct, aided and abetted by Feinberg, in promising to use his position as a United States Senator to help obtain government contracts for the purchase of titanium from a mining venture in which the defendants held an interest. The promises were alleged to have been made in connection with two transactions, the first, a proposed loan of $100 million ostensibly to have been financed by a fictitious entity known as Abdul Enterprises, Ltd. This entity, purporting to be an enterprise of two wealthy Arab sheiks, was the cover of an elaborate "sting" operation conducted by agents of the Federal Bureau of Investigation. See Myers II, supra, 692 F.2d at 829-30. The second transaction, also proposed by the Abscam operatives, involved a second Arab group's offer to purchase the mining venture for a sum that would have yielded all the owners of the venture an estimated $70 million profit. For each transaction the indictment charged four offenses: bribery,

in violation of 18 U.S.C. § 201(c) (1976) (Counts Two and Six); receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201 (g) (Counts Three and Seven); conflict of interest, in violation of 18 U.S.C. § 203(a) (Counts Four and Eight); and interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. § 1952 (Counts Five and Nine).[2/] Count One charged a conspiracy to defraud the United States and to commit the substantive bribery, unlawful gratuity, and conflict-of-interest offenses, in violation of 18 U.S.C. § 371.

A jury trial began on March 30, 1981, and concluded on May 1, 1981. The jury found both defendants guilty on all nine counts. From June 22 to June 25, 1981, the District Court conducted a "due process" hearing to assess various post-trial claims, including the defendants' basic contention that the Government's conduct of the Abscam investigation exceeded the standard of fairness mandated by the Due Process Clause of the Fiftn Amendment. On December 22, 1981, Judge Pratt issued a comprehensive opinion rejecting all of the defendants' claims, except Feinberg's motion for judgment of acquittal on Count Five for insufficiency of the evidence, which was granted. United States v. Williams, 529 F. Supp. 1085 (E.D.N.Y. 1981). Thereafter Judge Pratt sentenced Williams to three years' imprisonment and fines totalling $50,000; Feinberg received a sentence of three years' imprisonment and fines totalling $40,000.

II.

The Government's evidence against Williams and Feinberg revealed transactions more elaborate than those of the Congressmen in Myers who accepted $50,000 in cash in exchange for their promises to help secure private immigration legislation. Despite the complexity and higher stakes, however, the essentials of the criminal conduct in this case remained straightforward: a public official's seeking monetary benefit in exchange for his promise to use his official position.

The background events were recounted by Henry A. ("Sandy") Williams, III, a friend and business associate of Senator Williams but not a relative, who testified for the Government after receiving a grant of immunity. In 1975 Sandy Williams became aware of a mining property in Piney River, Virginia. The property was initially thought to be rich in phosphorus and, later, in titanium. Sandy Williams acquired an option on the property for Penque Williams, Inc., a corporation owned equally by him and an associate. Upon acquiring the option in 1975, Sandy Williams discussed the property with Senator Williams and told him that considerable help would be needed to get the venture started. The Senator assured Sandy Williams that he would "give us all the help that he could possibly give us" and, as Sandy Williams further testified, "for that we agreed that he would get one half of my interest in Penque Williams, Inc." In 1976 Sandy Williams obtained enough financing to

exercise the option on the Piney River property and formed a new corporation, United States Titanium Corporation, to take title to the property. Sandy Williams held a 28-1/3% interest in the new corporation, and on March 23, he executed a document acknowledging that half of his interest (approximately 14%) was owned by the Senator. The Senator retained the document in his Senate office files.[3/] For three years nothing happened, since the mining venture lacked the necessary capital, estimated by Sandy Williams to be $13 million. Enter Abdul Enterprises, Ltd., the fictitious entity created by the Federal Bureau of Investigation as a source of funds ostensibly supplied by two Arab sheiks looking for investment opportunities.

The Loan Transaction

As the Myers case reveals, one of the first politicians to become interested in the prospect of obtaining money from Abdul Enterprises was Angelo Errichetti, then the Mayor of Camden, New Jersey, and a member of the New Jersey Senate. In January 1979, Errichetti mentioned to his friend Senator Williams that he had established contact with wealthy Arab investors. Williams' reaction was to tell his long-time friend and associate, attorney Alexander Feinberg, to contact Errichetti and "see what the hell's going on." By this time Feinberg had acquired a percentage of the mining venture in return for his looking after the Senator's interests and helping to make presentations to potential investors. Feinberg, Errichetti, and Sandy Williams

met with an FBI agent and an FBI informant, Melvin Weinberg, both posing as representatives of one of the sheiks. Feinberg stated that Senator Williams was interested in the mining project and was anxious to have it funded. He also made it clear that the Senator had an undisclosed interest in the venture, which he said was half of Feinberg's share. As Errichetti described the relationship to the sheik's representatives, Feinberg was the Senator's "bagman." Sandy Williams said that $13 million was needed to get the mining venture into operation. In early March, Sandy Williams suggested to the sheik's representatives that Abdul Enterprises loan an additional $70 million to finance the purchase of a titanium dioxide plant owned by the American Cyanamid Company. He estimated the total financing needs were $100 million.

On March 21, 1979, Sandy Williams discussed with the Senator a meeting the Senator was scheduled to have with the sheik two days later on board a yacht in Florida. Sandy Williams testified that he told the Senator, "Pete [the Senator's nickname], this is an important meeting," to which the Senator replied, "Sandy, look, I will do everything possible to get that money." At a party aboard the yacht on March 23, the Senator met the sheik and told one of the sheik's representatives that he was interested in having the mine funded and would "assist [the representative] in any way possible in getting this project going." The next day Errichetti reported to the sheiks'

representatives how impressed the Senator had been and that he "can be of service to you in Washington or wherever. This is Government stuff, now."

The opportunity for such service appears to have initially come to the attention of Sandy Williams and George Katz, another friend of the Senator's and also a participant in the mining venture, as a result of newspaper articles in late May outlining the need for titanium for national defense, especially its use in submarines. Katz telephoned Weinberg, read him one of the articles, and estimated that the venture could market forty thousand tons a year "[i]f you go into a titanium metal which the United States is short of." In discussing the articles with Sandy Williams, Katz raised the prospect of the Senator's helping to secure government contracts for titanium. Sandy Williams testified that Katz told him, "Sandy, this deal, if it was going to be made, the senator is going to have to exert himself, is going to have to try to get the government contracts for this project." Sandy Williams responded that the Senator could not get government contracts for the project because, as he understood it, contracts in excess of $25,000 were awarded strictly on the basis of competitive bidding. Sandy Williams further testified that later that same day Katz told him competitive bidding was not required:

> He said, you are all wrong about bidding on a government contract. You can negotiate, he said, a contract with the government, if it is a scarce item, if it is an item the government needs, you don't have to bid on it.

> And I didn't argue with him because George was in the garbage business in New Jersey and he was dealing in government contracts and I took what he said to be true.

On May 30, Weinberg asked Feinberg in a recorded conversation whether the Senator can "do something on getting us the contracts." Feinberg replied, "We can try." The next day the sheik's representatives held a luncheon meeting with the Senator at the Pierre Hotel in New York City. Just before the luncheon, Feinberg told Weinberg in a recorded conversation,

> On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts.

Moments later Feinberg met with Weinberg and F.B.I. agent Anthony Amoroso, one of the principal undercover operatives. Their recorded conversation included the following:

> Amoroso: Is [the Senator] going to be able to steer any kind of contracts from the Committees that he's on toward, toward the operation that we're going to get involved with? I mean [--]
>
> Feinberg: Well this I didn't know until now I have to ask him that.
>
> Amoroso: Yeah.
>
> Feinberg: I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [--]

Also prior to the luncheon, the Senator met with Feinberg and Sandy Williams. At this meeting, according to the testimony of Sandy Williams, Feinberg told the Senator, "Pete, the important thing [a]bout this meeting is going to be your help in getting

government contracts," and the Senator replied, "I understand."

At the luncheon meeting, when, the Government contends, the subject of getting government contracts arose, the Senator stated, "I can't say yes or no, sure try." The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the luncheon indicate that the Senator understood his role. Second, Amoroso, who attended the luncheon, testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.[4/]

With the Senator and his cohort having expressed an eagerness to receive from Abdul Enterprises loans totaling nearly $100 million, the Senator met with the sheik on June 28 to persuade him that the Senator's influence justified making the loans. The videotaped conversation reveals Williams discussing at length his ability to be influential with the Government as a result of his senior position in the Senate. In addition to mentioning his close relationship with the Vice-President ("used to work for me, on the committee") and the Secretary of State ("a

neighbor back in New Jersey . . . we're very close"), the Senator assured the sheik:

> I only involve myself in something that I, I just completely believe in and this one, this whole situation we've presented through the mine, the processing and the product. I believe it, you know. With . . . great pleasure talk to the President of the United States about it and, you know, in a personal way and get him as enthusiastic and excited because we know what our country needs.

Government contracts were explicitly mentioned:

> Williams: We've got thirty thousand tons we could produce a year. Therefore, with what we got of this value, knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one.
>
> . . . .
>
> And we've got a combination here, we're a couple of Senators and . . . when we work together, Senator Errichetti and I, it works.
>
> . . . .
>
> Amoroso: [The sheik] feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing --
>
> Williams: Right through.
>
> . . . .
>
> Amoroso: . . . [T]his is why I wanted you to meet with the sheik and he wanted to meet with you because I think without you . . . he would've felt it was just another business deal.
>
> Errichetti: Well, without the Senator, there is no -- forget it. There's no, no mines or nothing. In fact, the Senator, Pete had the opportunity wherewithall and the know-how

in his position as the United States Senator.
. . .

Williams: Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions.

. . . .

Amoroso: Well, then, there -- in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

. . . .

Amoroso: Well, that, like we discussed, ah that end of it is really, uh, not our concern, it's none of our business, who you go to --

Williams: Yeah.

Amoroso: -- you know, to do --

Williams: But you can be assured that we, we --

Amoroso: -- the manipulation behind the behind the scenes.

Williams: -- we have a relationship that will make all of that possible. That's that's all I want to tell you now.

The conversation also revealed the Senator's reason for being helpful and the means for receiving his financial reward:

Williams: I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time.

Amoroso: Alright. Well, then we're agreed on the -- I just wanted, uh, for you to tell us who you wanted to have it in --

Williams: Alex.

Amoroso: -- so that we're gonna put your shares in Alex's name --

Williams: Alex.

Amoroso: -- and he will control them and I think ah he's gonna actually sign them and then, if you want, you can maintain possession of them.

Errichetti: [Inaudible] as he sees fit.

Williams: That's the way to do it. Yeah.

On August 5, at a meeting at a restaurant at John F. Kennedy Airport, the Senator accepted stock certificates representing an 18% share in three corporations Feinberg had formed to carry out the mining venture. As previously agreed, the certificates had been issued to Feinberg, who then endorsed them in blank. In the recorded conversation of the meeting, Williams acknowledged his understanding of the arrangement:

Amoroso: [T]hese are the certificates and I had Alex endorse them . . . .

. . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

The Purchase Transaction

At the August 5 meeting, the sheik's representatives broached the possibility that a second group of Arabs might be willing to pay millions of dollars for an outright purchase of the mining venture. On August 27 Katz and Sandy Williams met with the Senator to compare this second opportunity to the first approach of obtaining only loans. According to Sandy Williams' testimony, Katz told the Senator that, as part of the sale, he would have to "stay . . . with the same kind of arrangement . . . and he [help?] get government contracts [for the new owners]." The Senator replied, "We'll go the second way." Sandy Williams also testified that on September 4, Feinberg told the Senator that the "same things that he promised Yassir . . . he would do for the second group," and the Senator said that he would.

The principals in the mining venture met with the Senator on September 11 to decide whether to sell their interests to the second group of Arabs for a sum estimated by Sandy Williams to produce a profit for the group of $70 million. The meeting was videotaped. Under the proposal Sandy Williams was to be employed by the new group to run the venture, and he would be the person to contact the Senator. The Senator's role was spelled out by Weinberg:

> The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. You're the one that's gotta give us the O.K. to do it. If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get

> us government contracts. Ya do it for them. No, in no way would your name be mentioned there or any shares in your name. And if they have to reach you it'll be through strictly, through Sandy.

In the ensuing discussion, the Senator acknowledged, as he had previously told Feinberg and Sandy Williams, that the assistance already promised to the Arab lenders would continue for the Arab purchasers:

> [P]ut it this way to them, that this group to give them, whatever they feel there's some assurance this entity will continue with 'em.
>
> . . . .
>
> And be helpful to them.
>
> . . . .
>
> We got this all together on certain premises and they will, they will continue.

At one point the Senator suggested that a more appropriate selling price might be $100 million. Ultimately Feinberg made a motion that the principals agree to sell the venture, and the other four participants -- Senator Williams, Sandy Williams, Katz, and Errichetti -- all voted "Aye."

On October 7, at a meeting at the Plaza Hotel in New York City, which was recorded, the Senator and Feinberg explained to the sheik's representatives how Williams' profits from the sale would be concealed, at least for the present. The issue arose when Amoroso told the Senator that Katz had understood from the September 11 meeting that "all of a sudden you were going to announce to the world . . . [t]hat you . . . got 15 million

dollars." Williams replied, "Oh Christ no." The exact arrangement was unclear, but the essential point was made by Feinberg in these words: "I know how to get him money now without him declaring it." Some form of a blind trust was to be used, which Feinberg assured the Senator would conceal his interest until he retired. "Then you can say I've got it." The Senator expressed his understanding that while some contemporaneous record would be made, no disclosure would occur until years later:

> There are ways and ways to . . . be on a, on a certain record. Now, if it['']s a blind trust er, uhh that's the way for my purposes, I, I will find a way to . . . make that kind and nobody knows nothing.
>
> . . . .
>
> And then way down the road someone said, well, you know he had all of his interests and nobody knew anything. Well, there we have it under the trust. You see. So I've done what I had to do.

Defenses

In the face of this overwhelming evidence of the Senator's seeking funds for the financing and purchase of a mining venture in which he had an interest in exchange for his assistance in obtaining government contracts for the venture, Williams and Feinberg attempted a defense based on the alternative propositions that either no crimes had been committed, or, if any had been committed, they were the product of government entrapment. See United States v. Valencia, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981) (outlining limited opportunity

for alternative defenses of non-involvement and entrapment).[5/] The entrapment contention was put to the jury primarily through the argument of counsel. In their testimony the defendants endeavored to deny the commission of any crimes. Feinberg's approach was to claim that it was legitimate for a Senator to agree to use his influence to help obtain government contracts, despite the Senator's having a financial interest in the venture and seeking loans, necessary for the venture's viability, and the sale of the venture in exchange for his assistance. In Feinberg's view, there was nothing wrong with the arrangement because the Senator was only going to be "opening up the doors" and because he and the Senator intended ultimately to disclose the Senator's interest.

The Senator's equally brazen denial of wrongdoing proceeded on two levels. First, he denied that he had agreed to do anything with respect to government contracts. Though the Senator primarily asserted that he had made no promise to obtain contracts, he also insisted, in the face of his recorded statements to the contrary, that he had not agreed even to try to secure contracts. He told the jury, "I just knew I was not going to say anything about contracts." Second, the Senator contended that whatever he had done was only to benefit his friends, Feinberg and Sandy Williams: "I knew how hard they were working on this mine, my friends, and I wanted to help them." Despite the recorded conversations in which he received his shares of stock

and discussed the concealment of his interest, he told the jury, "I was not interested . . . in receiving any stock."

III.

On appeal, the defendants raise primarily three issues relating to or supplementing their defense of entrapment. First, they contend that the evidence established entrapment as a matter of law, by which they mean that the evidence was insufficient to permit a jury reasonably to find beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. Second, they contend that the trial judge erred in his charge concerning entrapment. Third, they contend that the totality of the Government's actions in orchestrating the crimes charged constituted outrageous conduct beyond an outer limit of fairness established by the Due Process Clause.

A. Entrapment as a Matter of Law

Appellants contend, and the Government has never disputed, that there was sufficient evidence of inducement of the defendants by the undercover agents to place upon the prosecution the burden of proving beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. See Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). What the parties dispute is whether there was sufficient evidence to permit the jury reasonably to conclude beyond a reasonable doubt that the defendants were predisposed, i.e., "ready and willing without persuasion" to commit offenses

of the sort charged and "awaiting any propitious opportunity," United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (L. Hand, J.). Appellants allege that the government agents initiated all aspects of the crimes, that the Senator and his cohort initially rejected the idea of any criminal conduct, and that government agents improperly persisted in persuading the Senator to commit crimes that they were not ready and willing to commit. We conclude that the evidence permitted the jury to reach quite different conclusions, although the evidence of governmental persuasion is substantial.

Government Initiation

As we have noted, the initial involvement of Senator Williams with the Abscam "sting" operation originated with the Senator, not with the Government. Alerted by Errichetti to the availability of money to be invested by wealthy Arabs, the Senator instructed Feinberg to pursue the matter. Moreover, it was an associate of the Senator's, Sandy Williams, who specified the amount of money, $100 million, that the Senator's group hoped to interest Abdul Enterprises in lending. The first indications that Senator Williams would be of assistance to the venture also originated with the Senator. He had assured Sandy Williams as early as 1975 that he would give the mining venture all the help he possibly could. When the prospect of possible financing from Abdul Enterprises arose in early 1979, the Senator repeated to Sandy Williams his willingness to help the venture and so

informed one of the sheik's representatives at the yacht party on March 23, 1979. The first suggestion that the Senator's help might involve use of his official position was Errichetti's statement the next day, March 24, that the Senator "can be of service to you in Washington or wherever. This is government stuff, now." Only after these preliminary indications of the Senator's willingness to be helpful on "government stuff" did the Abscam operatives broach the specific subject of government contracts, first to Feinberg on May 30 and then to the Senator at the Pierre Hotel on May 31.[6/]

Defendants' Reluctance

The record flatly refutes the claim of reluctance on the part of the defendants. Feinberg's response to the first offer of a criminal opportunity on May 30 was, "We can try." On May 31 the Senator assured Feinberg and Sandy Williams that he understood the importance of his help in getting government contracts, and his first response to a government agent's offer of a criminal opportunity was his statement to the sheik's representatives at the luncheon meeting that day that he would "sure try" to get contracts. The Senator repeated his willingness to seek government contracts for the mining venture in conversations with Sandy Williams on June 16 and June 24. On June 19, at a meeting in his Washington office with Errichetti and Feinberg, the Senator expressed no reluctance to Errichetti's urging that he impress the sheik how willing he was to help obtain government

contracts. As Feinberg reported to Weinberg in a recorded conversation the night of the Washington meeting, "It's all beautiful. He's very agreeable. No problem." The extent of the Senator's willingness to "try" was made abundantly clear in the Senator's June 28 conversation with the sheik when he offered to use his influence with various government officials including the President. In fact, the record is barren of expressions by the Senator of any hesitation whatever in agreeing to use his influence to try to obtain Government contracts in order to secure financing for the mining venture.

Appellants take unwarranted comfort in one remark attributed to the Senator by Errichetti and in statements of Sandy Williams, Feinberg, and Katz. Errichetti, in a recorded conversation on June 27, related the June 19 conversation in the Senator's Washington office in which he had told the Senator how important it was to be persuasive when the Senator met the sheik on June 28. Errichetti claims he said to the Senator, "You're gonna fucking guarantee that fucking contract. He said 'no way.'" If the jury credited this remark, which significantly was not mentioned by Senator Williams in his trial testimony, they were entitled to conclude that the Senator was demurring only to making a claim that he would "guarantee" a government contract; his willingness to use his influence to <u>try</u> to obtain contracts remained undiminished.

What Williams' brief calls a "negative response" by

Sandy Williams and Feinberg is their momentary uncertainty as to whether the Senator would try to obtain government contracts. Sandy Williams said on April 23, "Well, I don't know about that." Feinberg said on May 31, just before the Pierre Hotel luncheon, "Well, this I didn't know until now I have to ask him that." However, Feinberg's very next sentence was, "I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [--]."

No more helpful to defendants is Katz' comment to Weinberg in a recorded conversation on June 10, that the Senator "doesn't use that power for any advantages." The context makes clear that Katz was referring to the Senator's reluctance to use power for leadership within the Senate. As Katz explained, "He's not the kind of a guy like Long or Kennedy, where they've got the power and they use it." When Weinberg then said, "Well he said he would get us the contracts you know," Katz replied, "Oh there's no question if he's got an interest, he'll do something like that, naturally."

Even more unhelpful to appellants' cause are the occasions on which, according to appellants, the Senator refused opportunities to receive unlawful payments, separate from the millions of dollars he agreed to accept for the financing and purchase of the mining venture. These episodes, in fact, provided the jury with additional evidence of a damning nature. The first episode concerns Weinberg's July 9, 1979, offer to Sandy

Williams to pay the Senator $20,000 in cash as "expense money." Sandy Williams testified that he relayed the offer to the Senator on July 18. The Senator asked, "Sandy, do I have to be handed the money?" to which Sandy Williams answered, "Pete, I don't want you to be handed the money." The Senator then suggested that Sandy Williams "go and get the 20,000" and agreed to split the money with him. The next day the Senator suggested that Sandy Williams send part of the cash to the Senator's son who needed funds to purchase a car. When the undercover agents learned of the Senator's unwillingness to accept the cash personally, they decided not to make the payment.

The second episode occurred on January 15, 1980, when the Senator met with the sheik for the last time. The conversation was recorded. The sheik offered to pay the Senator cash in return for the Senator's assisting him to immigrate and obtain permanent residence. The Senator refused, explaining "when I work in that area, that kind of activity, it is purely . . . public." But, despite having been offered a bribe, the Senator stated his willingness to help the sheik with his immigration problem because this would help the mining venture succeed. The Senator referred to his help as "a desirable thing to do for you, personally" and "part of creating something of value, bringing in that ore."

Government Persuasion

Once Senator Williams expressed a willingness to agree

to use his influence to try to obtain government contracts, Weinberg, acting for the Government, endeavored to make sure that when the Senator met with the sheik, he would spell out his willingness clearly and emphatically for the benefit of the sheik and the television camera. To achieve this objective, Weinberg enlisted Errichetti and Feinberg and then took on the assignment directly. On June 7, Weinberg told Errichetti, in a recorded conversation, "Let Tony [Agent Amoroso] and you speak to Senator . . . all we want to hear from him is that he's going to get us some government contracts." On June 15, in a recorded conversation, Weinberg told a group of the Senator's associates, including Errichetti and Feinberg, "The Senator's gotta be told alright? In no [un]certain terms that he's gotta move his fucking ass to get the goddamn government contracts."

The messengers warmed to their task. In a recorded conversation on June 27 Errichetti gave a group of the Senator's associates this account of a June 19 session he had had with the Senator in his Senate office:

> When I went there, he didn't say two fucking words. I got Pete by the fucking throat, I tell you about as close as I came in this office. Let me tell you something . . . don't you go fucking this thing up. I got a chance to make a fucking million dollars . . . . All you're gonna do is give a fucking speech like you never gave in your life . . . . You're gonna fucking guarantee that fucking contract. He said "no way."
>
> . . . .
>
> He said, "no way." I said you're gonna fucking say it. . . . Never mind about doing it. You're gonna fucking say it."

At the same June 27 session, Feinberg reported, "I also told Pete that he after that won't ever have to open his mouth." In anticipation of the next day's meeting with the sheik, Feinberg telephoned the Senator from the meeting and told him, "Eric [Errichetti] will talk to you before you go in and just like he said it[']s a bullshit speech."

On June 28, in a recorded conversation ten minutes before the Senator's meeting with the sheik, Weinberg personally carried the message to the Senator in these words:

> Forget the mine. Don't even mention the mine. All you have to do is tell him, alright.
>
> . . . .
>
> How high you are in the Senate. He's interested in you.
>
> . . . .
>
> Without, without you there is no deal. You are the deal. You put this together. You worked on this and you can get, you got the government contracts. Without me there is no government contracts.
>
> . . . .
>
> [A]nd you tell him in no [un]certain terms without me there is no deal. I'm the man. I'm the man who's gonna open the doors, I'm the man who's gonna do this to use my influence and I guarantee this. Follow me?
>
> . . . .
>
> All bullshit.
>
> . . . .
>
> And that's it, it goes no further, it[']s all talk, all

bullshit. That's all he wants to hear.

. . . .

It's a walk-through. You should be out of there in twenty minutes.

. . . .

You're on stage for twenty minutes.

. . . .

So you ready to go on-stage?

As we recounted in Myers II, supra, 692 F.2d at 839-40, this "coaching" by Weinberg, especially the June 28 episode, dismayed at least some Government prosecutors and precipitated a meeting of prosecutors and F.B.I. agents on August 9, 1979, at which Weinberg was cautioned about such tactics.

Basis for a Finding of Predisposition

Notwithstanding the evidence of persuasion, the jury was fully entitled to find, from the totality of the evidence, that the defendants were "ready and willing" to commit the crimes charged as soon as the opportunity was first presented -- to Feinberg on May 30 and to Senator Williams on May 31 -- and at all times thereafter. At no time did either defendant hesitate or express any reluctance. Even if the jury believed that the Senator told Errichetti on June 19 that he could not "guarantee" government contracts, he continually expressed to the agents, and to his associates in private conversations, his willingness to use his influence to try to obtain the contracts for a venture in

which he had a concealed interest. And the evidence fully entitled the jury to conclude that the defendants understood that the Senator's agreement to help to obtain contracts was a condition for obtaining the loan and later the prospect of a sale. The jury was also entitled to consider his prompt willingness to accept half of the $20,000 in "expense" money that Weinberg discussed with Sandy Williams. And the jury could also consider his agreement to assist the sheik on an immigration problem as "part of creating something of value, bringing in that ore."

The "coaching" carried out by Weinberg on June 28 and earlier through Errichetti and Feinberg was a factor to be considered by the jury in assessing predisposition, but these tactics do not detract from the sufficiency of the evidence of the Senator's predisposition because the jury was entitled to conclude, as the Senator himself testified, that he paid little attention to what Errichetti and Weinberg told him and decided for himself what he would say at the crucial June 28 meeting with the sheik.[7/] Indeed, the salient feature of the entrapment defenses asserted in this case is that both defendants testified and neither one even claimed that the persuasion of the government agents had prompted them to commit the crimes charged.[8/] That omission may have been the inevitable consequence of their trial strategy of simultaneously denying criminal conduct and claiming entrapment. Whatever their motive, the defendants, by their testimony, made it relatively easy for the prosecution to

sustain its burden of proof on predisposition.

On the entire record, Judge Pratt was correct in ruling that the prosecution presented sufficient evidence of the defendants' predisposition to permit the jury to reject their defense of entrapment.

B. Challenge to the Entrapment Instructions

Appellants contend that the entrapment instructions were erroneous in two respects. They first claim that Judge Pratt removed the issue of entrapment from the jury's consideration. The basis for this claim is the following portion of the charge:

> You are not to be concerned with whether the prosecution or the F.B.I. agents or Mr. Weinberg acted legally or illegally, properly or improperly or whether the Abscam investigation itself was conducted properly. Those are questions which must be decided by me at an appropriate time.

The challenged sentences were not error. It was not any part of the jury's function to decide whether the Abscam tactics were illegal or improper. Their function, as Judge Pratt told them, was to decide whether they were satisfied beyond a reasonable doubt that each defendant was predisposed to commit the crimes charged. And with respect to that question Judge Pratt instructed as follows:

> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circum-

stances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator Sandy Williams, George Katz, and Angelo Errichetti.

In the same vein, the sentence immediately preceding the passage complained of by the appellants instructed the jury as follows:

> What the F.B.I. agents and Mr. Weinberg did should concern you only to the extent that you find that it affected the conduct and state of mind of a defendant or other participants in the conspiracy or only insofar as it may affect the credibility of any witness with respect to the matters before you.

The charge, taken as a whole, fully and fairly permitted the jury to consider the Abscam tactics as they related to the defense of entrapment.

The second claim arises from Judge Pratt's response to a question asked by the jury during deliberations. The jury's note read as follows:

> Would you kindly explain the legal guidelines of a scam operation?
>
> At what point do the practices or methods used in a scam become entrapment in regards to the law?
>
> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

This note precipitated an extended colloquy between Judge Pratt and counsel for both defendants. Attorney Koelzer, representing Williams, began by noting that part of the inquiry had misstated the burden of proof with respect to entrapment.

Whereas the note had asked, "Does entrapment have to be established from day one of the indictment," Koelzer correctly pointed out that, once inducement is shown, the Government has to prove predisposition. Taking the jury's phrase, he maintained that predisposition had to be proved "'from day one.' In other words, from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt --." Judge Pratt promptly interjected, "That is an overstatement." Attorney Batchelder, representing Feinberg, pointed out that the question related to entrapment, not predisposition, and that entrapment can occur anytime during the scheme. Disputing Attorney Koelzer, he added, "So when he says that you have to have entrapment from square one, the answer is no, no, no, no." He then suggested that the entrapment portion of the original charge be reread in full. Judge Pratt then ascertained that both counsel agreed to that suggestion.

When the jury was recalled, Judge Pratt began by making sure the jury understood that, since inducement was not disputed, the defendants had no burden to establish anything with respect to entrapment, that the burden was upon the Government to disprove the defense by showing that the defendants were predisposed to commit the crimes. At that point, he made the statements that appellants now contend created reversible error:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when

he committed the crime was he predisposed to do it or wasn't he.

This was followed by a rereading of the entrapment portion of the original charge. At the conclusion of the supplemental charge, Judge Pratt asked if there were exceptions and counsel took none, other than to preserve their prior objections to the original charge.

As a general proposition of law the fragment of the supplemental response now challenged by appellants was erroneous. A defendant's predisposition is not to be assessed "as of that time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime. By "state of mind" we do not mean to require specific prior contemplation of criminal conduct. It is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion. The phrase "ready and willing" adequately captures that concept and does so in a manner likely to be comprehensible to juries.

In the circumstances of this case, however, the erroneous statement in the supplemental charge does not warrant reversal for several reasons. First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to Judge Pratt a

correct statement of the law that would have answered the jury's questions. Attorney Koelzer's initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as Judge Pratt noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents.[9/] Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment,[10/] which correctly set forth the applicable principles, see United States v. Parisi, 674 F.2d 126, 128 (1st Cir. 1982), and, following United States v. Viviano, 437 F.2d 295, 299 (2d Cir.), cert. denied, 402 U.S. 983 (1971), focused the jury's attention on the three possible bases of proving predisposition -- a design to commit the offense formed prior to any inducement, a prompt and unhesitating agreement to the corrupt proposal, or an existing course of similar conduct. Fourth, and most important, on the facts of this case, the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition.

Thereafter the Senator simply repeated and emphasized his willingness to commit the crimes. On the facts of this case, the supplemental charge, taken as a whole, contained no prejudicial error.

C. Claim of a Due Process Violation

Appellants contend that the methods used by the government agents in developing the cases against them exceed an outer limit of fairness mandated by the Due Process Clause. This argument is to be distinguished from the basic defense of entrapment. That defense, as recognized in the federal courts, focuses on the state of mind of the defendant and precludes conviction only when government agents by their inducements prevail upon a person who was not predisposed to commit the type of crime charged. Though it has been insistently urged that the entrapment defense should focus exclusively on the conduct of the agents and preclude a conviction whenever their conduct could be expected to induce an average person to commit the crime, see, e.g., Sherman v. United States, supra, 356 U.S. at 378-85 (Frankfurter, J., concurring); Sorrells v. United States, supra, 287 U.S. at 453-59 (Roberts, J., concurring), a majority of the Supreme Court has never accepted this objective test. However, in recent years, the minority of those on the Supreme Court favoring an objective test has been somewhat encouraged by the suggestion, subscribed to by five members of the Court in Hampton v. United States, 425 U.S. 484, 491-95 (1976) (Powell, J., concurring, joined by Blackmun,

J.); id. at 495-500 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.), that extreme cases may arise where the government conduct was so outrageous as to violate due process, even though the evidence permitted the jury to find that the defendant was predisposed. Since the Supreme Court has never applied the Due Process Clause to invalidate a conviction based on "outrageous" governmental inducement, we do not know what sort of circumstances the Court believes would meet this elusive standard. In assessing whether the circumstances of a given case present such extreme facts, care must be taken, as the Third Circuit has observed in an Abscam case, "not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense." United States v. Jannotti, 673 F.2d 578, 608 (3d Cir.) (en banc), cert. denied, 102 S. Ct. 2906 (1982).

We have previously declined to hold that the Abscam operation violated the Due Process Clause, Myers II, supra, 692 F.2d at 836-47; United States v. Alexandro, 675 F.2d 34, 39-42 (2d Cir.), cert. denied, 103 S. Ct. 78 (1982), and we see no basis for concluding that the activities of the government operatives directed against the defendants in this case exceeded the constitutional limits of fairness. Appellants point most insistently to the "coaching" activities of Weinberg, which we have recounted. It is understandable that agents who have heard a suspect make incriminating statements or been told by others that

he has made them will be anxious to provide an opportunity for the suspect to repeat these statements under circumstances where they can be surreptitiously, though lawfully,[11/] recorded. Appellants maintain, however, that Weinberg went further and endeavored to put words in the Senator's mouth.[12/] However these "coaching" tactics might square with our personal notions of appropriate law enforcement conduct, our judicial task is to measure these tactics against the as yet undefined standard of "outrageous" conduct that the Supreme Court has suggested might offend constitutional limits. That standard was not exceeded in this case. There is lacking in this record any indication that the "coaching" was persistently directed at an unwilling subject in an unconscionable effort to erode his law-abiding instincts. The most that Weinberg did was to spell out for the Senator how to commit the crimes, but his "coaching" involved neither pressure nor persistent exploitation of personal weakness, as might occur if an agent preys upon an addict's need for narcotics. See Sherman v. United States, supra. Moreover, it would be hard to imagine that government conduct could ever be deemed so outrageously unfair to a defendant as to warrant dismissal of charges when the defendant asserts that he scarcely paid any attention to what was said to him.

One aspect of this case that distinguishes it from prior Abscam convictions is the size of the inducements offered to the defendants. The proposed loan of $100 million and the

proposed profits of $70 million from the sale unquestionably involve sums of money far in excess of the amounts normally tendered by government agents in an attempt to catch an "unwary criminal," Sherman v. United States, supra, 356 U.S. at 373. However, as Judge Pratt pointed out, 527 F. Supp. at 1101, the loan was to be repaid with interest. Therefore, its value to the defendants was not the amount of the loan, but rather the profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan. Moreover, the amount of financing needed for the venture was determined by Sandy Williams and proposed to the agents. Only the purchase proposal involved selection by the Abscam operatives of a dollar figure, and even this figure was related to the figures already proposed by the principals in the mining venture. The combined property that the second group of Arabs was purportedly interested in buying included the American Cyanamid plant, which Sandy Williams had estimated could be purchased for $70 million.

We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator. In this case the claim is wholly without merit. There is no evidence that the Senator's anticipated share of the profits from

the loan or the sale exerted an unconscionable pressure upon him. He readily agreed to the loan transaction, and when the purchase was proposed, he calmly discussed with his associates whether the loan or the purchase was more advantageous for them and then, without any hesitation, agreed to the purchase. He even suggested at one point that the sale price should be increased to yield profits of $100 million. When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established.

Apart from the clear evidence of Weinberg's "coaching" and the size of the inducements, the appellants' complaints about Abscam are not different from those voiced by defendants in Myers II. These include the use of as disreputable a person as Weinberg, the failure to record every conversation with all of the co-conspirators (although no claim is made of an exculpatory remark made to a government agent that was not recorded), the lack of a basis for suspecting Senator Williams before responding to the overtures initiated by Errichetti and Feinberg at the Senator's suggestion, and the failure to ascertain that the Senator would accept a criminal opportunity before the agents met with him. None of the circumstances cited by the appellants, nor their aggregate effect, constitutes the sort of outrageous imposition upon an individual that might exceed a due process test of

constitutional fairness. See Myers II, supra; United States v. Alexandro, supra; United States v. Jannotti, supra.

One aspect of the evolution of the criminal conduct evidenced by the record merits additional comment. When the Abscam operatives broached the possibility of criminal conduct to the Congressmen in Myers II, the proposal was, from the start, a clear-cut invitation to commit a crime: $50,000 was offered solely in exchange for an agreement to use official influence with respect to an immigration matter. The criminal opportunity presented to Senator Williams differs in one important respect. The financial inducement, the $100 million loan, was initially discussed in connection with what appeared to be an entirely legitimate business transaction. Then, after Errichetti suggested that the Senator "can be of service," the agents broached the prospect of the Senator's unlawfully using his influence for private gain.

We recognized in Myers II the possibility that "at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness." 692 F.2d at 843. The subtle shifting of a legitimate proposal into an unlawful one, as occurred in this case, has the potential for presenting a jury with close questions of intent and risking incorrect fact-finding -- a risk that could be substantially reduced if agents simply put to a target the kind of straightforward

proposal offered to the Congressmen in Myers II. Of course, many cases involve the risk that juries will incorrectly assess key facts, especially those, like intent, that cannot be objectively ascertained. It is not the risk of factual error that creates unease; it is the needless creation of that risk by governmental action.

We have reviewed the record with this concern in mind and have reached the conclusion that the clarity of the evidence places this case well short of any point at which we might be apprehensive that the verdicts had been rendered needlessly questionable by governmentally created ambiguities in the presentation of a criminal opportunity to a target. The evidence not only permitted the jury to find the Senator and his accomplice guilty; it reveals them as unmistakably involved in a corrupt agreement to misuse public office for private gain. The ultimate terms of the proposal were put to the Senator with clarity on repeated occasions. His understanding was evidenced by his own recorded statements on June 28 and again on September 11. And his state of mind was fully revealed not only by his statements with respect to the crimes charged but also by his willingness to accept cash if he could receive it indirectly and his willingness to help the mining venture succeed by assisting on an immigration matter for which he had been offered (and had refused) a cash bribe. On this record we find no unconstitutional conduct that taints the validity of a judgment of conviction.

IV.

Appellants make three claims concerning the construction of the statutes under which they were indicted. First, they contend that Counts Four and Eight failed to state an offense under the conflict-of-interest statute, 18 U.S.C. § 203(a), because the prospective government contracts for the purchase of titanium were not identified with sufficient particularity. The statute punishes receipt of compensation for services to be rendered in relation to any "proceeding, application, . . . contract, claim, . . . or other particular matter" in which the United States has a substantial interest.[13/] We accept the appellants' argument, based on the structure of the statute, that the phrase "other particular matter" has the effect of causing the adjective "particular" to modify all of the preceding nouns, including "contract." However, we disagree that the force of the adjective is so strong as to require pleading or proof of a single contract identified by contract number or similar individualized detail. It is sufficient if the compensation has been received for services to be rendered with respect to a particular category of contracts. The description of government contracts for the purchase of titanium sufficiently particularizes the services to be rendered in this case to state an offense. The fact that the statute applies to future proceedings not yet pending, United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Johnson, 215 F.

Supp. 300, 316 (D. Md. 1963), aff'd, 337 F.2d 180, 196 (4th Cir. 1964), aff'd on other grounds, 383 U.S. 169 (1966), indicates that it applies to a particular category of matters, and need not be narrowed to just one identified contract, which might not be known until a proceeding involving the contract was actually pending.[14/]

Second, the appellants contend that Count One, the conspiracy charge, failed to state an offense under 18 U.S.C. § 371 because it alleged that an objective of the conspiracy was to deprive the United States of the "honest and faithful services of a United States Senator." Their point is that a United States Senator, having been elected by the citizens of his or her state, owes honest and faithful service only to them and not to the United States. The argument is without merit. The numerous statutes enacted to punish criminal behavior by Members of Congress demonstrate the assertion of a significant interest on the part of the national government in the honest performance of duties by those elected to the national legislature. There can be no serious doubt as to the constitutionality of these statutes.

Third, appellants contend that the phrase "anything of value," receipt of which is proscribed by the statutes punishing bribery, 18 U.S.C. § 201(c), and unlawful gratuity, 18 U.S.C. § 201(g), means something that objectively has actual value. Their point in this regard is that the stock received by the

Senator had no commercial value, and that Judge Pratt erred when he told the jury that stock could be a thing of value "if, regardless of its actual worth in the commercial world, you find that the defendant believed that the stock had value for himself." We think Judge Pratt correctly construed the statutes to focus on the value that the defendants subjectively attached to the items received. The phrase "anything of value" in bribery and related statutes has consistently been given a broad meaning, e.g., United States v. Girard, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979), to carry out the congressional purpose of punishing misuse of public office. Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe. When the Senator received shares of stock in the three corporations organized to hold the properties of the mining venture, he expected these shares to have considerable value, representing not only the potential value of the properties but also the benefit of the contemplated loan of $100 million.

V.

Only two of the appellants' remaining contentions merit any discussion. First, appellants contend that the District Court erred in admitting evidence of two transactions in which Senator Williams used his influence in an effort to advance the financial interests of himself and his wife. One effort

concerned the application of the Ritz-Carlton Casino to obtain a casino license from the New Jersey Casino Control Commission and to secure exemption from Commission guidelines requiring new construction. The Hardwicke Companies, part of the consortium backing the Ritz-Carlton, employed the Senator's wife as a consultant and later paid a $50,000 fee to defendant Feinberg. The Senator himself expected to receive $1 million as his share of a finder's fee to be paid in connection with financing for the Ritz-Carlton, which was to be supplied by Abdul Enterprises. Just prior to the Commission's vote on the Ritz-Carlton application in May 1979, the Senator, without any urging by the Abscam operatives, called the Commission chairman. In a recorded conversation on October 7, 1979, the Senator acknowledged making the call; his efforts and similar efforts by Feinberg were asserted by Feinberg, in the same conversation, to have "changed" the Commission's "mind" and saved $30 million. The other effort concerned the Senator's contacts during the 1970's with various New Jersey officials on behalf of Biocel of New Jersey, a corporation formed by Sandy Williams to franchise garbage recycling technology. Sandy Williams had given half of his interest in Biocel to Senator Williams, the Senator had brought Feinberg into the project, and the Senator and Feinberg had subsequently decided to give a 13% interest in a subsidiary of Biocel to the Senator's wife.

Conduct "'morally indistinguishable'" from the offenses

charged is probative on the issue of predisposition, United States v. Viviano, supra, 437 F.2d at 299 n.3 (quoting United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice as mandated by Fed. R. Evid. 403. Since counsel for appellants argued strenuously to the jury that any criminal conduct occurring in connection with the Senator's agreement to try to obtain government contracts for the titanium mining venture was the product of governmental inducement, it was appropriate to present evidence of the Senator's use of his influence on behalf of himself and his wife in circumstances where no government agent asked him to do so. Even if, as appellants contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law. Judge Pratt's admission of the Ritz-Carlton and Biocel evidence was well within his discretion.

The remaining contention is that Count One of the indictment was duplicitous in alleging a conspiracy both to defraud the United States and to commit various substantive offenses. "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.'" Braverman v. United States, 317 U.S. 49, 54 (1942) (quoting

Frohwerk v. United States, 249 U.S. 204, 210 (1919)). This principle has been specifically applied to a single count charging conspiracy to defraud the United States and to commit substantive offenses. United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940). The specificity of the conspiracy-to-defraud allegations and the jury's verdicts on the substantive counts eliminate any possibility of the concerns expressed in United States v. Rosenblatt, 554 F.2d 36, 40-42 (2d Cir. 1977), on which appellants rely, that a count alleging only a conspiracy to defraud the United States in some unspecified way risks conviction without either an allegation or proof of the essential nature of the fraud.

VI.

We have considered appellants' other claims and are satisfied that they are without merit and do not warrant discussion. For all of the reasons set forth in this opinion and for the further reasons set forth in the comprehensive opinion of Judge Pratt, denying the defendants' post-trial motions, we conclude that both appellants were fairly tried and that there is no legal infirmity in their convictions. The judgments appealed from are affirmed.

F O O T N O T E S

1/ We have previously rejected pretrial challenges to the indictment. United States v. Williams, 644 F.2d 950 (2d Cir. 1981).

2/ Counts Two through Four alleged that Senator Williams sought and agreed to receive a loan of money for a business enterprise in which he had an interest and sought and agreed to receive shares of stock in the enterprise. Count Five referred only to the shares of stock. Counts Six through Nine alleged that Senator Williams sought and agreed to receive a sum of money as proceeds from the sale of the enterprise.

3/ At trial the Senator sought to dispel the significance of the 1976 document. Though the point is irrelevant in view of the Senator's 1979 receipt of stock certificates evidencing his share of the venture, we note that in a recorded conversation on September 11, 1979, when the tax consequences of a sale of the venture were discussed, the Senator stated, "We can put our investment back to the beginning of Piney River for the capital gains," a date Sandy Williams reminded the Senator was 1976.

4/ A taped telephone conversation on June 8 included this exchange between Feinberg and Weinberg:

Weinberg: All Yassir [the sheik] wants to know is that he's gonna get contracts.

Feinberg: Well he can't gu -- he's gonna help us, he's already said that.

. . . .

You heard him say it, didn't you?

. . . .

Weinberg: Yeah, I heard him say it.

Both Feinberg and Weinberg had attended the May 31 luncheon.

At a June 15 meeting, also recorded, this exchange occurred:

Feinberg: I talked to the Senator before in New York. I said these people and everybody understands that you have to help us get these contracts. He said of course I will. Isn't that right?

Sandy Williams: Definitely, I was right there.

5/ On this appeal, the Government disputes that a defendant who takes the stand and denies commission of a crime may also assert the inconsistent defense that he was entrapped into committing the crime. The point is more pertinent to Senator Williams, who denied committing certain of the acts alleged, than to Feinberg, who denied that the acts committed were criminal in nature. In United States v. Valencia, supra, 645 F.2d at 1170-72, we noted the division among the circuits as to whether a defendant may both deny commission of a crime and claim entrapment. We ruled narrowly that a defendant could claim

non-participation and also entrapment if "he did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." Id. at 1172. That ruling permitted a defendant, who did not testify, to argue to a jury that the prosecution had failed to meet its burden of proving either commission of the crime or the defendant's predisposition. We did not, however, go further and consider whether a defendant who testifies that he did not commit the crime could also claim, in the alternative, that, if he did, his actions were the product of government entrapment. Because the Government did not object to an entrapment charge in this case and because we find no reversible error in connection with the District Court's handling of the defense of entrapment, we leave open the issue whether inconsistent defenses may be asserted in circumstances beyond those that occurred in Valencia.

6/ On April 23, 1979, Weinberg asked Sandy Williams whether the Senator could "get us the bids" on government contracts for chemicals. At trial, neither the Senator nor Feinberg made any claim that Sandy Williams ever mentioned this inquiry to them.

7/ On direct examination, when asked about Weinberg's "coaching" session with him on the morning of June 28, the Senator testified:

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

On cross-examination, this exchange occurred:

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?
>
> A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

Earlier, when asked on direct examination whether he had been "put off" by what Errichetti and Weinberg had urged him to say, he answered:

> It was offensive but it didn'[t] mean a great deal to me to tell you the truth.

8/ Feinberg claimed in his trial testimony that he had been "under a lot of pressure by Mr. Weinberg," but he also insisted, "We had done nothing at all illegitimate."

9/ The standard charge on entrapment requires the prosecution to prove that the defendant was ready and willing to commit the crimes charged "before anything at all occurred respecting the alleged offense." 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 13.09, at 364 (3d ed. 1977). In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. Such preliminary contact is normally not conduct "respecting the alleged offense." Since the

entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

We do not rule out the possibility, however, that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one. In the pending case, the first contact by the Abscam operatives with the defendants that involved any discussions "respecting the alleged offense" was the presentation of a criminal opportunity on May 30.

10/ The charge included the following language:

> Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered.
>
> To sustain its burden of proof the government has to satisfy you that its agents have not induced an innocent person, but that the inducement which brought about the offenses charged simply brought about another instance of the kind of conduct which the defendant was prepared to engage in, if offered an opportunity which appeared favorable. Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the

offenses charged whenever a favorable opportunity was offered to commit them, then you may find the government did no more than furnish a convenient opening for the criminal opportunity in which the defendants were prepared to engage.

11/ Appellants' claim that the recordings violated their Fourth Amendment rights is entirely without merit. In every instance, recordings were made by a participant to the conversations in whom the other speakers had simply misplaced their confidence. United States v. White, 401 U.S. 745, 752-53 (1971); 18 U.S.C. § 2511(2)(c) (1976).

12/ There was evidence at the due process hearing, denied by Weinberg, that at the August 9, 1979, meeting at which Weinberg was reprimanded, he told the agents that he had "to put words in people's mouths or we won't make any cases." The remark was testified to by two FBI agents. See Myers, II, supra, 692 F.2d at 839. Whether or not Weinberg made the remark, his conduct glaringly reveals that the alleged remark accurately reflected his intent.

13/ The scope and background of section 203(a) are reviewed at length in Myers II, supra, 692 F.2d at 853-58.

14/ Unlike Congressman Murphy, whose conviction for violating the conflict-of-interest statute was reversed, see Myers II, supra, 692 F.2d at 853-58, Senator Williams made no claim that his efforts with respect to matters before government

agencies would be limited to giving advice, as distinguished from acting in a representative capacity to secure favorable treatment. Though the charge as to the conflict-of-interest violation in the pending case broadly (and erroneously, id.) stated that the services covered by section 203(a) include giving advice, the broad charge was not objected to at trial, the evidence showed only an agreement to try to influence government officials to award contracts, and no claim concerning the scope of services covered by section 203(a) is raised on appeal. On this record, the error with respect to the section 203(a) charge is harmless and has been waived.

Nos. ~~83-256 and~~ 83-5108

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ALEXANDER FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was plain error justifying reversal to instruct the jury, in connection with petitioners' entrapment defense, to determine petitioners' predisposition at the time they committed the offense.

2. Whether petitioners' convictions on bribery-related offenses should be reversed because government undercover agents offered large sums in exchange for the improper use of a United States Senator's influence.

3. Whether evidence of prior similar acts was incorrectly admitted against petitioner Feinberg.

4. Whether warrantless electronic recordings of a meeting, made with the consent of at least one party to the meeting, violate the Fourth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 705 F.2d 603. The opinion of the district court (Pet. App. 46a-87a) is reported at 529 F. Supp. 1085.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983 (Pet. App. 88a-89a). A petition for rehearing was denied on May 24, 1983 (Pet. App. 90a-91a). The

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[1] "Pet. App." refers to the appendix to the petition in No. 83-256.

petition for a writ of certiorari in No. 83-5108 was filed on July 22, 1983. In No. 83-256, Justice Marshall extended the time for filing a petition for a writ of certiorari to August 22, 1983, and the petition was filed on August 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, each petitioner was convicted on two counts of bribery, in violation of 18 U.S.C. 201(c); two counts of receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g); two counts of unlawful conflict of interest, in violation of 18 U.S.C. 203(a); and two counts of interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[2] Each petitioner was also convicted on one count of conspiracy to commit these substantive offenses and to defraud the United States, in violation of 18 U.S.C. 371. Petitioner Williams was sentenced to concurrent terms of three years' imprisonment and fines totalling $50,000. Petitioner Feinberg was sentenced to concurrent terms of three years' imprisonment and fines totalling $40,000. Pet. App. 4a-5a.

1. In 1975, Henry A. (Sandy) Williams, III, a friend and business associate (but not a relative) of petitioner Williams, who was then a United States Senator from New Jersey, acquired an option on mining property in Piney River, Virginia.[3] Sandy Williams believed that property to be rich in titanium, and he discussed the mine's potential

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[2]The district court granted petitioner Feinberg's motion for judgment of acquittal on one of the counts charging interstate travel to conduct the unlawful activity of bribery (Pet. App. 58a-59a), and that count is not now in issue.

[3]Sandy Williams testified for the government at the trial under a grant of immunity (Pet. App. 5a).

with Senator Williams, saying that he would need help in making the venture operative. Senator Williams told Sandy Williams "that he would 'give [the mining project] all the help that he could' " (Pet. App. 6a). In return Senator Williams was to receive one half of Sandy Williams's interest in the corporation that owned the mine. *Id.* at 5a-6a.

In 1976, Sandy Williams exercised the option on the Piney River property. He had a 28 1/3% interest (including that committed to Senator Williams) in the corporation that took title to the property. On March 23, 1976, Sandy Williams executed a document acknowledging Senator Williams's half interest in his share of the corporation; Senator Williams retained that document in his office. Petitioner Feinberg, a "long-time friend and associate" of Senator Williams, also acquired an interest in the mining venture, "in return for his looking after the Senator's interests and helping to make presentations to potential investors" (Pet. App. 7a). The venture remained dormant, however, because it lacked the necessary capital (*id.* at 6a).

In January 1979, Angelo Errichetti, then Mayor of Camden, New Jersey, mentioned to Senator Williams that he had established contact with wealthy Arab sheiks seeking to invest a large amount of money. The people whom Errichetti contacted were in fact FBI undercover operatives engaged in what has come to be known as the Abscam investigation. Senator Williams told petitioner Feinberg to contact Errichetti about the investors and " 'see what the hell's going on.' " Pet. App. 6a-7a.

Soon thereafter, Feinberg, Errichetti, and Sandy Williams arranged a meeting with two persons — FBI informant Weinberg and an FBI agent — who were posing as representatives of the wealthy sheik. Errichetti told the sheik's representatives that Feinberg was Senator Williams's "bagman." Feinberg made it clear that Senator Williams

had an undisclosed interest in the mine and said that Senator Williams was eager to see the venture funded. Pet. App. 7a, 51a. Sandy Williams initially suggested to the undercover agents that $13 million would be needed to fund the venture; in early March, he revised that estimate to $100 million, explaining that the mining corporation should purchase a nearby processing plant. *Id.* at 7a.

Senator Williams met with the sheik and his representatives on seven different occasions (Pet. App. 52a). His first meeting with them was on a yacht in Florida on March 23. Two days before that meeting, Sandy Williams told Senator Williams that the meeting was "important," and Senator Williams replied: "Sandy, look, I will do everything possible to get that money." At the meeting, Senator Williams said to one of the sheik's representatives that he would "assist * * * in any way possible in getting this project going." The next day, Errichetti told the sheik's representatives that the Senator "can be of service to you in Washington or wherever. This is Government stuff, now." *Id.* at 7a-8a.

In May 1979, George Katz, another friend of the Senator who was also a participant in the mining venture, read a newspaper article describing the government's need for titanium for defense purposes. Katz then suggested — in a telephone call to informant Weinberg, who was acting as the sheik's representative, and in a conversation with Sandy Williams — that the Senator could help the venture by obtaining government contracts.[4] On May 30, Weinberg,

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[4]In its opinion rejecting petitioners' challenges to the verdicts, the district court described Katz as "a businessman with a known criminal background" (Pet. App. 63a).

Katz and Errichetti were indicted with petitioners. Katz was severed because he was too ill to stand trial. Errichetti was severed because he was tried (and subsequently convicted) on charges arising out of another aspect of the Abscam investigation. See *Myers* v. *United States*, cert. denied, No. 82-1255 (May 31, 1983).

pursuing Katz's suggestion, asked Feinberg in a tape-recorded conversation whether Senator Williams could "do something on getting us the contracts." Feinberg replied: "We can try." The next day, Senator Williams again met with the undercover agents. Immediately before the meeting, Feinberg told Weinberg, in a conversation that was again recorded: "On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts." Pet. App. 8a-9a.

Also immediately before meeting the agents, Senator Williams met with Feinberg and Sandy Williams. Sandy Williams testified that at this meeting, Feinberg told Senator Williams, calling him by his nickname, "Pete, the important thing [a]bout this meeting is going to be your help in getting government contracts." The Senator replied: "I understand." Pet. App. 9a-10a.

After the subject of government contracts arose at the meeting with the agents, Senator Williams remarked, "I can't say yes or no, sure try." The court of appeals described the context in which this remark occurred (Pet. App. 10a; footnote omitted):

> The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the [meeting] indicate that the Senator understood his role. Second, [undercover agent] Amoroso [acting as a representative of the sheik] * * * testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both

Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.

On June 28, the Senator again met with the sheik and his representatives and, in an effort to persuade them to make the loan, boasted of his influence in the government. In the course of this videotaped conversation, Senator Williams spoke of his close relationship with the Vice-President and the Secretary of State and said that he would be pleased to speak personally with the President on behalf of the mining venture. Pet. App. 11a.

At this meeting, Senator Williams mentioned the output of the mine and commented, "knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one." Agent Amoroso, posing as the sheik's representative, said to Senator Williams that the sheik "feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing —." Senator Williams's reply was: "Right through." Agent Amoroso then commented that he wanted the Senator to meet the sheik because otherwise the sheik "would've felt it was just another business deal." Errichetti then said: "Well, without the Senator, there is no — forget it. There's no, no mines or nothing." Senator Williams said: "Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions." The following exchange then occurred:

Amoroso: Well, then, there — in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

Pet. App. 11a-13a.

During the same videotaped conversation, Senator Williams explained that he was being helpful because "I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time." Senator Williams and Amoroso then agreed that stock certificates intended for Senator Williams would be issued initially to Feinberg, who could transfer them to the Senator at some later time. At a subsequent recorded meeting, on August 5, Senator Williams accepted stock certificates representing an 18% share in the corporations Feinberg had formed to carry out the mining venture. In keeping with their agreement, the certificates were made out to Feinberg, who endorsed them in blank. The court of appeals quoted the following excerpt from the recorded conversation, in which, it noted, Senator Williams "acknowledged his understanding of the arrangement":

Amoroso: [T]hese are the certificates and I had Alex endorse them. . . .

. . . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

Pet. App. 13a-14a.

2. At the same meeting, the sheik's representatives suggested that another group of Arab investors might be willing to buy the mining venture outright. According to

Sandy Williams's testimony, Senator Williams twice told his associates that, as part of the purchase transaction, he would agree to seek government contracts on behalf of the new owners. At a subsequent videotaped meeting at which the proposed sale was discussed, Weinberg said to Senator Williams: "The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. * * * If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get us government contracts." Senator Williams agreed, saying: "We got this all together on certain premises and they will, they will continue." Pet. App. 15a-16a. At a videotaped meeting on October 7, Senator Williams, Feinberg, and Amoroso discussed ways in which Senator Williams's profits from the sale of the venture could be concealed until he retired; they agreed to use some form of blind trust, and Senator Williams remarked that such an arrangement would ensure that "nobody knows nothing" (*id.* at 16a-17a).

ARGUMENT

1. a. Petitioner Williams's principal contention (83-256 Pet. 12-19), joined by petitioner Feinberg (83-5108 Pet. 36-37), is that the convictions should be reversed because of a supplemental instruction that dealt with petitioners' entrapment defense. During its deliberations, the jury sent a note to the district judge asking the following question (Pet. App. 30a):

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

Petitioner Williams's counsel noted that the question appeared to presuppose that the defendants had the burden of proof; he contended that since it was undisputed that the

government had induced petitioners to commit the offense, the government had the burden of proving predisposition beyond a reasonable doubt. Petitioner Williams's counsel further urged that the government had to prove "from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt." Petitioner Feinberg's counsel, taking issue with petitioner Williams's attorney, argued that "when he says that you have to have entrapment from square one, the answer is no, no, no, no." Pet. App. 30a.

When the jury was recalled, the district judge explained that since inducement had been shown, the burden of proving predisposition was on the government, not the defendants. He then made the statement to which petitioners object:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.

Pursuant to an agreement reached with counsel before the jury was recalled, the trial judge then repeated the charge on entrapment he had previously given. After the jury again retired, the district judge asked if counsel had any objections; except for reiterating their objections to the initial charge, they made none. Pet. App. 31a.

The court of appeals ruled that "[a]s a general proposition of law" the challenged supplemental instruction "was erroneous" because "[n]ormally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime" (Pet. App. 31a-32a). But the court of appeals nonetheless declined to reverse the convictions "[i]n the circumstances of this

case" (*ibid.*). The court explained (*id.* at 32a-33a; footnotes omitted):

> First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to [the district judge] a correct statement of the law that would have answered the jury's questions. [Petitioner Williams's counsel's] initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as [the district judge] noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents. Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment, which correctly set forth the applicable principles * * *.

Finally, and "most important," the court explained, "the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition. Thereafter the Senator simply repeated and emphasized his willingness to commit the crimes." *Id.* at 32a-34a.

b. Petitioners' principal contention is that the government must prove that they were predisposed to commit a crime when "the Government agent first approached the[m]" (83-256 Pet. 16) — before any illegality was

broached. This is wrong. As the court of appeals explained (Pet. App. 32a n.9):

> In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. * * * Since the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

As the court of appeals recognized,[5] it may be possible to imagine cases in which the jury, in deciding whether a defendant was predisposed, should consider whether government agents created in the defendant a willingness to commit a crime before they actually made an explicit suggestion of criminality. But this is plainly not such a case. Between January 1979, when Senator Williams's associates first contacted the Abscam investigators, and May 1979, the first occasion on which a government agent suggested illegal activity in connection with the mining venture, Abscam operatives did nothing that might have made a law-abiding person willing to engage in criminal acts. The agents simply gave petitioners and their associates an opportunity to act in the way they would have acted toward anyone who expressed an interest in investing money in their venture. Government agents did not concoct the mining venture; they did not induce Senator Williams to accept a financial interest in the venture, for he had done so before the

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[5]See Pet. App. 32a n.9 ("We do not rule out the possibility * * * that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one.").

Abscam investigation even began. Nor did they persuade Senator Williams to take an active role in promoting the venture: Senator Williams's immediate reaction upon hearing of the wealthy Arabs was to ask petitioner Feinberg to pursue the matter further; the Senator's associates freely bandied his name about, apparently with his assent; and the Senator met with the undercover agents in March to demonstrate his active support for the venture. If, in January 1979, petitioners and their associates were disposed to obtain financing only through lawful means, nothing the undercover agents did prior to the time criminal conduct was suggested would have changed that disposition.

In addition, as the court of appeals noted, trial counsel did not object to the district judge's supplemental instruction, even though the judge specifically gave them an opportunity to do so. If the precise timing of the inquiry into predisposition were as central to the defense as petitioners now suggest, it is difficult to understand why there was no objection. See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (footnote omitted) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

Finally, as the court of appeals again noted, the district court reread the full entrapment instruction immediately after it gave the supplemental instruction. Taken as a whole (see, *e.g.*, *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); *United States* v. *Parisi*, 674 F.2d 126, 127-128 (1st Cir. 1982)), the instructions made it clear to the jury that it should acquit the defendants if it believed that government agents instilled in them a disposition to commit the crimes:

> The term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act.

> * * * [I]n their efforts to enforce the laws, government officials and their agents may not entrap an innocent person who, except for the government inducement, would not have engaged in the criminal conduct charged. * * * [If government agents] initiate, entice, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct, the government may not obtain a conviction based upon the fruits of that instigation. * * *
>
> * * * * *
>
> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator[s] Sandy Williams, George Katz, and Angelo Errichetti. * * *

Pet. App. 92a-94a. See also Pet. App. 33a n.10.

2. Both petitioners also contend that the government's conduct was so outrageous that their convictions should be reversed on due process grounds (83-256 Pet. 20-27; 83-5108 Pet. 23-29). These contentions are without merit. The record shows that the agents acted properly at each stage of the investigation.

The agents did not approach petitioners to discuss the mining venture; Feinberg and Sandy Williams approached the agents through Errichetti. At the first meeting in January 1979, Feinberg made it clear that Senator Williams had

an interest in the venture, and Errichetti described petitioner Feinberg as the Senator's "bagman." Senator Williams then agreed to meet with the agents. After that meeting, Errichetti told them that the Senator could "be of service to you in Washington." Pet. App. 6a-8a.

The agents were surely under no obligation to ignore these broad hints of corruption. As the district judge, who presided over the trial, explained in rejecting petitioners' motions to set aside the verdicts (Pet. App. 62a-63a):

> As early as March, 1979 there had been presented to the Abscam investigators, at defendant Williams' initiative, a proposed business venture whose principals included a businessman with a known criminal background (Katz), a grossly corrupt local politician (Errichetti), a lawyer (Feinberg) who was advertised by one of his own co-venturers as a "bag man" and who showed he was willing, if not anxious, to pay and receive bribes * * *. All three of them were enthusiastically pushing a titanium mine in which a United States Senator (Williams) had a hidden interest.

In this context, petitioners' associate Katz proposed that Senator Williams's influence could be used to obtain government contracts. When an agent repeated that proposal to petitioners, petitioners considered it briefly and then readily accepted. In short, the agents merely undertook the investigative actions needed to expose the corruption that they had good reason to believe was present.[6]

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[6]Petitioner Williams emphasizes his refusal, at one meeting with the sheik, to accept a cash bribe in return for assisting the sheik in obtaining permanent resident status in the United States (83-256 Pet. 9-10). But petitioner Williams does not mention that, after having been offered that bribe, he did not terminate the conversation; he continued to discuss the titanium mine with the sheik and, in connection with the mining venture, said that he would help the sheik with his immigration problems (see Pet. App. 23a-24a).

a. Petitioners assert that the large amount of money offered by the undercover agents created an unreasonably great temptation (see 83-256 Pet. 25; 83-5108 Pet. 25-29). But petitioners first agreed to use Senator Williams's influence in exchange for a loan, not a payment of cash. The amount of the loan that the group hoped to obtain was specified, not by government agents, but by petitioners' associate Sandy Williams. Moreover, as the court of appeals and the district court pointed out, the loan was to be repaid with interest; thus its value to petitioners "was not the amount of the loan, but rather the profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan." Pet. App. 36a-37a; see *id.* at 75a.

It appears that the sale transaction, unlike the loan, would have guaranteed a substantial profit for petitioners. But by the time the sale was proposed, petitioners had already entered into one corrupt bargain in return for the loan. Thus they cannot plausibly suggest that the size of the inducement involved in the sale was decisive in overcoming their reservations about acting illegally. In addition, as the court below noted, the sale price was again based on "figures already proposed by the principals in the mining venture" (Pet. App. 37a). Indeed, during the negotiations Senator Williams urged that the sale price be increased. "When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established." *Ibid.*[7]

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[7]See also Pet. App. 37a: "There is no evidence that the Senator's anticipated share of the profits from the loan or the sale exerted an unconscionable pressure upon him."

Moreover, the dollar amount of an inducement cannot be the sole factor in evaluating the propriety of the government's investigative activity. Petitioners were selling something — the influence of an important United States Senator — that can be of enormous value to a person who has a financial stake in the outcome of a government decision. The government and the public accordingly have a strong interest in determining whether a Senator can be corrupted even by very large amounts of money. See Pet. App. 37a ("We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator.").

At the same time, it is difficult to see how petitioners can claim that they were treated unfairly. They were not in desperate financial condition. They were, it appears, sophisticated businessmen; if, at the time of the proposed transactions, they considered the amounts being offered to be excessive, they must have thought that they were taking advantage of ignorant or gullible investors. On the other hand, if at the time of the proposed transactions they considered the amounts to be reasonable in view of what they were offering, it is difficult to see how the inducement can be viewed as excessive.[8]

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[8]Petitioner Williams urges (83-256 Pet. 23-25) that the government violated its own guidelines in carrying out the investigation. Contrary to petitioner Williams's suggestion, of course, such guidelines would not define the limits that the Due Process Clause places on law enforcement activity; it is not only appropriate but salutary for the executive branch to go beyond constitutional requirements in regulating its criminal investigations (see *United States* v. *Russell*, 411 U.S. 423, 435 (1973)), and when it does so the restrictions it imposes are not ordinarily enforceable in court (see *United States* v. *Caceres*, 440 U.S. 741 (1979)).

It is also unclear which "guidelines" petitioner is invoking. We are advised by the United States Attorney's office that DP Exh. 110, which petitioner quotes, consists of testimony given by government officials,

b. Petitioner Williams also suggests (83-256 Pet. 25, 26) that the government's conduct of the investigation violated the Due Process Clause because he was "coached" by Weinberg to say that he would aid the investors in obtaining government contracts. But as both courts below noted, when petitioner Williams testified at trial he specifically and repeatedly denied that the "coaching" influenced his behavior. See Pet. App. 27a-28a, 66a-69a. The district judge, who presided over the trial, found that "despite the prompting and 'coaching' by Errichetti and Weinberg before his meeting with the sheik on June 28, 1979, defendant Williams acted voluntarily and intentionally in that meeting and was not influenced to say or do anything that he had not previously agreed to say and do; consequently, Williams was not prejudiced by the conduct of Weinberg and Errichetti" (*id.* at 70a). "At trial Williams' own attorney exhaustively questioned him about the effect of Weinberg's suggestions and comments" (*id.* at 66a-67a), and when asked about Weinberg's "coaching," petitioner Williams testified (*id.* at 27a n.7):

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after the Abscam operation became publicly known, to a House committee investigating the operation. In that testimony, the officials explained that the operation did conform to the proper standards for regulating such investigative activity.

In any event, the investigation in this case did not violate the "guidelines" that petitioner attributes to the government. The Abscam agents had reason to suspect that criminal activity was afoot from the time of their first meeting with Feinberg, Errichetti, and Sandy Williams, because it was at that meeting that they learned of Senator Williams's hidden interest in the mine and heard Errichetti — the mayor of a large city and an associate of the Senator — describe Feinberg as the Senator's "bagman." The agents made it clear to Senator Williams and his associates that they were interested in exchanging Senator Williams's help in securing contracts for valuable consideration. And for the reasons we have explained, the inducements did not exceed what the "real world" might offer to a United States Senator and those seeking to profit from peddling his influence.

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

Similarly, when petitioner Williams was asked whether he was offended by what Errichetti and Weinberg told him to say, he replied (Pet. App. 28a n.7): "It was offensive but it didn[t] mean a great deal to me to tell you the truth." At another point petitioner Williams testified (*id.* at 67a; emphasis added by the district court):

> Q. Senator, now Weinberg is saying to you clearly, government contracts, using your influence. And all you are saying here is um-hum, gotcha, um-hum, um-hum. What were you thinking when this was going on?
>
> A. What I started to develop a moment ago, while he's going on this way I was thinking of what I was going to develop when I got upstairs. * * * *but there can be no exaggeration, no statement of things I know I could not do, would not do* in no shape was I going to be associated with, even in a baloney sense as they called for, and that was a contract.

Petitioner Williams also testified (Pet. App. 27a-28a n.7):

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?
>
> A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

As the district court explained (Pet. App. 69a):

> At trial, Williams' position was essentially that the videotape did not incriminate him, but the jury obviously rejected his argument. Now, Williams asserts

> that the incriminating statements he made on videotape were the product of coaching; but his sworn testimony unequivocally establishes that his statements and action on camera were voluntary and intentional. They cannot be dismissed as merely the product of Weinberg's urgings.

Since petitioner Williams explicitly and repeatedly asserted that Weinberg's coaching did not influence him, he is plainly not entitled to relief on this basis.

3. Petitioner Feinberg also objects to the district court's admission of evidence concerning other occasions on which petitioner Williams, assisted by petitioner Feinberg, used his influence on behalf of projects in which Williams had a financial interest. On one occasion, petitioner Williams boasted at a meeting with Abscam agents that he had telephoned the chairman of the New Jersey Casino Control Commission in support of an application for a casino license by the Ritz-Carlton Casino. Petitioner Feinberg boasted at the same meeting that he had also used his influence in this way. The Ritz-Carlton employed petitioner Williams's wife as a consultant and later paid petitioner Feinberg a $50,000 fee. Pet. App. 43a.

These efforts to use influence were made without any urging by government agents,[9] and the district court found that petitioners' recorded statements about the ways in which they used their influence were "made under circumstances that were designed to impress the listeners with their know-how, their awareness of political reality, their ability to achieve results, and their willingness to use the Senator's influence for financial gain" (Pet. App. 78a-79a). The other prior acts evidence concerned contacts petitioners Williams

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[9]Petitioners subsequently claimed that they had not actually attempted to use their influence in these ways, even though they had boasted of doing so in front of government agents (see Pet. App. 77a-78a).

and Feinberg made on behalf of Biocel, a corporation formed by Sandy Williams in which petitioners Williams and Feinberg both had an interest. *Id.* at 42a-43a, 78a-79a.

Petitioner Feinberg acknowledges that evidence of prior acts can be used to show predisposition (83-5108 Pet. 32). His contention appears to be that his prior acts were innocent, not criminal (*id.* at 31-32, 34-35). But Fed. R. Evid. 404(b) permits the introduction of evidence of "other crimes, wrongs, *or acts*" (emphasis added) to prove such things as predisposition. As the court of appeals explained (Pet. App. 43a-44a):

> Conduct " 'morally indistinguishable' " from the offenses charged is probative on the issue of predisposition, *United States* v. *Viviano, supra,* 437 F.2d at 299 n.3 (quoting *United States* v. *Becker,* 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice * * *. Even if, as [petitioners] contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law.

In addition to proving predisposition, this evidence was admissible in this case — as the district court noted — to prove petitioners' "motive, opportunity, intent, preparation, and method of operation" (*id.* at 78a).

Moreover, petitioner Feinberg fails to explain how this evidence could have *unfairly* prejudiced him. He was free to argue to the jury that his prior actions were legitimate and did not show a propensity for attempting to profit from the improper use of Senator Williams's influence. If the prior acts evidence was damaging to him, that was only because it did indeed tend to show such a propensity. The district

court's decision to admit that evidence was, as the court of appeals ruled, "well within [its] discretion" (Pet. App. 44a) and does not warrant this Court's review.

4. Petitioner Williams also urges that the videotaping of his meetings with undercover operatives violated the Fourth Amendment (83-256 Pet. 17-30). As petitioner Williams concedes (*id.* at 30 n.16), this claim for suppression of the videotapes was not raised before trial (see Pet. App. 57a-58a), as required by Fed. R. Crim. P. 12(b)(3). Therefore it may not now be entertained. Fed. R. Crim. P. 12(e).

In any event, it is without merit. This Court has recently declined to review a similar contention made by other Abscam defendants (see 82-1183 Br. in Opp. 12-13).[10] Moreover, as petitioner Williams appears to acknowledge, this contention is inconsistent with *United States* v. *White*, 401 U.S. 745 (1971). Indeed, by recording meetings and conversations, the government helped ensure that the most accurate possible version of the events would be brought before the jury. As the district court remarked, "the quality of evidence produced by tape recordings, particularly by the videotapes in the Abscam cases, far exceeds the sketchy, imperfect evidence availab[l]e in the usual trial based upon witnesses' unaided recollections." In fact, a defendant who has a legitimate claim that he was subjected to improper pressure by government agents is likely to be most benefitted by videotaping in a case like this, because the videotapes will bring before the jury the most accurate possible reproduction of the events at issue.

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[10] "82-1183 Br. in Opp." refers to the government's consolidated brief in opposition in *Lederer* v. *United States*, No. 82-1183; *Murphy* v. *United States*, No. 82-1187; *Thompson* v. *United States*, No. 82-1199; *Criden* v. *United States*, No. 82-1240; and *Myers* v. *United States*, No. 82-1255. The Court denied certiorari in these cases on May 31, 1983.

Contrary to petitioner Williams (83-256 Pet. 28-30), the videotaping that the government undertook in this case does not even implicate the concerns raised by Justice Harlan's dissenting opinion in *White*. The government did not record private meetings between petitioners and their families or their close personal or political associates; the government videotaped only meetings that petitioners knew were business discussions, and petitioners came to those meetings fully aware that Senator Williams's influence would be a subject of discussion. No harm to society will result if officials become wary that their conduct at meetings of this kind might later be revealed to their constituents and the public at large.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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